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REPORTS.

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CASES DECIDED

From 1st of APRIL, 1887, to 30th of APRIL, 1890.

EDITED BY G. R. BYRNE, BARRISTER-AT-LAW, AND W. H. OSBORNE, SOLICITOR.

THE CASES REPORTED BY

J. HARRISON BYRNE (ASSOCIATE TO HIS HONOR THE CHIEF JUSTICE).

VOL. III.

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ERRATA.

Page 120, 1st column, 9th line from bottom, for strict, read "strained."

Page 122, 2nd column, 11th line from bottom, *delete* "I."

Page 123, 1st column, 3rd line from top, for accidently, read "accidentally."

Page 124, in *Zahel* v. *Buchan*, for *Smith* v. *Eldred*, read "*Smith* v. *Edwardes*," and add "22 Q.B.D., 10."

Page 126, 2nd column, 13th line from bottom, read "course" for cause.

Page 144, *Reg.* v. *Yaldwyn*, in line 3 of headnote, read "115" for 113.

Page 158, 2nd column, 8th line from top, read "Parisien" for Parisienne.

TABLE OF THE CASES REPORTED.

THE QUEENSLAND LAW JOURNAL REPORTS.

EDITED by G. R. BYRNE, Barrister-at-Law, and W. H. OSBORNE, Solicitor.

VOL. III.

8 QLJ 89

MARCH SITTING OF THE FULL COURT.

CHRISTOE *v.* GOLDEN CROWN GOLD MINING COMPANY, LIMITED.

Shares—Sale of—Transfer of—Authority of Agent to Transfer.

The appellant being the holder of 350 shares in the defendant company authorised C., one of the members of the firm of L. Brothers, mining agents and brokers, to sell the same. The said shares, instead of being sold by C., were sold by A., another member of the said firm, and were afterwards transferred by the defendant company to the purchaser on the application of A.

Held, that the sale by A. was wholly unauthorised.

Held, also, that it was the duty of the company, before transferring the said shares, to ascertain whether the person, purporting to sign his name to the transfer as appellant's agent, was authorised by the appellant so to do.

APPEAL from decision of the Northern Full Court on appeal (by statement of facts agreed to by parties) from judgment on hearing at Charters Towers.

The following are Mr. Justice Cooper's grounds for his decision on the appeal:—

This case was tried before me without a jury, at Charters Towers, on the 15th and 16th October last.

The plaintiff, who was at one time the holder of 350 shares in the defendant company, sought to recover damages from the defendants for an alleged wrongful sale of 300 of these shares, and alternatively to have his name restored to the register as the owner of the said shares.

The defence was that the plaintiff had given authority to one Alexander Livingstone, a mining broker, and secretary of the company, to sell the shares claimed by plaintiff.

The facts, so far as they came definitely before me, are set out at length in a statement agreed to by both parties and in my notes of evidence, and are shortly as follow:—

In November, 1884, plaintiff was in Charters Towers, and met two brothers named Livingstone, Alexander and Colin, who were carrying on business there under the style of "Livingstone Brothers," as mining agents and brokers, and he learned that the defendant company was being floated. He became the owner of 350 shares, and on leaving Charters Towers for Rockhampton on the 5th January, 1885, asked A. Livingstone, in Colin's presence, to forward the scrip as soon as it should be issued. He was registered as owner of the 350 shares on January 30th, 1885.

On the 20th March plaintiff sent a telegram to C. Livingstone:—"If you advise selling my Golden Crowns for seven shillings, do so." I construed that telegram as an authority to the firm Livingstone Brothers to sell plaintiff's shares for 7/- if they thought fit. A. Livingstone on the 15th April sold 200 of the shares for a price about which there was some dispute, and never accounted to plaintiff for the money, and never informed him at any time of the transaction.

About the 5th August, 1885, plaintiff met A. Livingstone at Rockhampton, and was told by him that the scrip was in the safe in his office, and that he could sell his shares for 13/- each. Plaintiff told Livingstone that he could sell for 15/- and not under. Notwithstanding this, A. Livingstone afterwards, and without consulting plaintiff, sold 100 more of the shares for less than 15/- each, and pocketed the proceeds. The transfers to the purchasers were in each case made by A. Livingstone, and signed by him "J. P. Christoe, by his Attorney, A. Livingstone."

A number of points was raised at the trial, and they were afterwards discussed before me on appeal. I gave judgment for the defendants, and dismissed the appeal on the ground that the plaintiff, having by his telegram of the 20th March given authority to Livingstone to sell his shares for 7/-, could not be heard upon a claim against the company for damages for a sale made in pursuance of such authority, and that his revocation (as to the price) of that authority, not communicated to the directors of the company put him in no better position with regard to the 100 shares. I was of opinion that plaintiff's remedy was against Livingstone alone.

During the argument on the appeal it was contended that the telegram of the 20th March was addressed to C.

Livingstone only, and was not intended to be acted on by A. Livingstone. This point was not definitely made at the trial, nor was plaintiff cross-examined upon it exhaustively, as might have been done had the point been sharply insisted on. A. Livingstone (who was undergoing a sentence of three years penal servitude) was present at the trial under an order made by me, but he was not called by either side.

I found as a fact that plaintiff sent the telegram intending it as an authority to either or both of the brothers to sell at 7/-.

I also found as facts that Livingstone Brothers were plaintiff's brokers; that Morgan gave 7/- for the shares, and that the signature "A. Livingstone" on the transfers was in Alexander Livingstone's handwriting.

POPE A. COOPER.

Real appeared on behalf of the appellant, the plaintiff below; and *Power* on behalf of the respondents, the defendants below.

Real cited *In re Bahia & San Francisco Railway Co.*, 3 Q.B., 584; *Bullen v. South New Zealand G.M. Co.*, 1 Q.L.J., 72, at 74; *Johnston v. Renton*, 9 Eq., 181; *Simm v. Anglo-American Telegraph Co.*, 5 Q.B.D., 188, at 203; *Story on Agency*, sec 126, 8th Amer. ed. It was the respondents' duty to inquire about the power of attorney, and see what authority it conferred. Even if the telegram were held to be an authority, it could be so only to C. Livingstone, and not to the firm with whom appellant had had no previous dealings. Moreover it was only an authority to sell, not to transfer.

Power: There was some evidence that appellant engaged both the Livingstones as his agents. He authorised the firm to sell shares for him; and therefore Alexander Livingstone was his competent agent to sell them. If the Court found that he was an agent to sell, he was also an agent to receive the money. Therefore the damage did not flow from the respondent company; and they were not liable. The verdict of the Northern Full Court ought to stand.

Real: It was agreed between parties for purposes of judgment that the damages should be as follow:—200 shares at 7/- = £70; 100 at 15/- = £75. He asked for judgment for £145 with costs.

LILLEY, C.J., gave judgment as follows:—In this case the plaintiff below, who is the appellant on this occasion, was possessed of 350 shares on the share register of the Golden Crown Gold Mining Company, Limited, and the secretary to the company was Alexander Livingstone. Alexander and Colin Livingstone were carrying on business as share brokers. That was the position of the parties in October, 1886. The scrip of the 350 shares had never been delivered to the plaintiff, Christoe, although it had been issued; and had been retained in the possession of the company, so far as we can see from the facts. There had been no dealings between the plaintiff, Christoe, and the Livingstones, as share brokers, but there had been a short correspondence. It does not appear to have extended beyond the exchange of letters between the plaintiff and Colin Livingstone. Colin Livingstone on the 5th March, 1885, wrote to Christoe, the plaintiff, giving him an account of various companies in which he was probably interested, and telling him the selling value of the shares in the Golden Crown Company. Then on 20th March, 1885,—the same month—the plaintiff sent a telegram to Colin Livingstone in these words:—"If you advise selling my Golden Crowns at seven shillings, do so." Now, to my mind, the true construction of this transaction, so far, is that Colin Livingstone was, if anybody was, the party with whom the plaintiff dealt. I do not think he was dealing at that time, nor do I think this telegram ought to be construed as showing that he was dealing, with the partnership of the brothers Livingstone. I think he was giving and meant to give—and the telegram must be construed as its actual words indicate—an authority to Colin to sell the Golden Crowns at seven shillings, if he thought fit, or would advise it, trusting his judgment in the matter. We find, instead of Colin Livingstone selling them, that they were sold by Alexander Livingstone, and, if I am right in my construction of the telegram, that was a wholly unauthorised act, because, if authorised to sell, Colin had no right to delegate his authority to his brother. Alexander then sold without authority. Assuming that the judge had in the court below put the right construction on that

telegram, and that it was to be construed as an authority to the firm to sell, yet it seems to be only an authority to the agent to sell, and not to carry the authority so far as to confer the additional authority for the conveyance and passage of the property in the chattels from the registered shareholder to the purchaser. There are many reasons why a man should keep control over the property until he has assured himself that his money is in safe hands. It is said that brokers on the Charters Towers field sell, and receive the purchase money. From Miles' evidence it seems it is not so; so that that practice which is not to be commended, I think, if it exists, did not authorise the subsequent act of Alexander Livingstone in executing the transfer, in which he assumed to be the authorised attorney of the plaintiff. If there had been a power of attorney in existence, and I think it was the duty of the company to see if there was, before registering the transfer on their books, then the plaintiff Christoe would have been bound by the authority he had given to Alexander Livingstone. There was no such power of attorney in existence. I am dealing now with the first set of 200 shares. There was no authority in Alexander Livingstone to sell them. If there was, there was no authority to make the conveyance, or if there was, there was no authority to receive the purchase money. The plaintiff has thus been deprived of his profit in them, and he is entitled to damages for the value of the 200 shares. We know that auctioneers and some other agents sell real and personal property, and with regard to one or two classes of agents, where the personal property is in their hands, that they may hand it over, and receive the money, but in the case of realty, and of some classes of personal property, such as this is, there is no authority in the agent, who is an agent to sell, to make the conveyance and receive the purchase money. Besides, there is an express provision as to transfers in the articles of association of this company. The 9th article says, "The transfer shall be endorsed upon the scrip, and shall be signed by both parties and attested;" so that it is perfectly clear that there must be a signature of either Christoe himself or of some one properly authorised by power of attorney signed by him. That being so the damages should be allowed for the 200 shares, at the rate of 7/- a share, or £70.

Then with regard to the 100 shares, all that I have said with regard to authority will apply. I think there was no authority to Alexander Livingstone to sell. If there was, there was no authority to convey or to receive the purchase money, and plaintiff is therefore entitled to damages for the amount of the purchase money on the 100, at a different rate, at 15/-, which will be £75. The total damages being £145, I think, upon the whole case, the appeal must be allowed, the judgment set aside, and a verdict entered for plaintiff for £145 with costs.

HARDING, J.: I think the evidence fully bears out the facts as stated by my learned brother, The Chief Justice, but I question whether it was even necessary for these facts to be so fully pointed out. I take the telegram, "If you advise selling my Golden Crowns at seven shillings, do so;" and construe that to amount to an authority to Colin Livingstone to enter into a contract for the sale of these shares, and for nothing more, and consequently I think it is not necessary that the facts should go to establish that it was a power to one agent rather than to another, or necessary that that power should be confined to one of the brothers, or to both of them. The view I take of the case is that the authority was to both or one to sell and nothing more. If a contract was entered into under that, on behalf of the plaintiff, with a purchaser, the plaintiff would be entitled to receive either by himself or his duly appointed agent his purchase money, and the purchaser would be entitled to receive a duly executed transfer, executed by the plaintiff or his duly appointed agent. Those would be their rights; but the agency of the Livingstones, both or either, would cease on the execution of the contract. In this case, a transfer—I do not think it matters by whom executed—executed by someone in the

name of the plaintiff, has been passed on. To my mind that transfer was absolutely unauthorised, and it bears upon its face that it was not executed by plaintiff himself. The regulations of the company require that the transfer should be executed both by transferor and transferee; consequently the company should have ascertained that the plaintiff had authorised the person, purporting to sign his name to the transfer as plaintiff's agent. If they had done this they would have enabled the plaintiff to have insisted upon the payment personally to him of the money, before he had handed over the transfer. In other words, he might have sent the transfer, executed by himself, to the bank with instructions to deliver it over on the purchase money being deposited. The company by the course they took debarred the plaintiff from taking this step; and instead they have registered a forged transfer and enabled some other person than the plaintiff to receive the purchase money. This was wrong *in toto*. If they have taken his shares from him and caused his money to go to someone else, they are liable to him, and must pay. If it is necessary to go into the facts of the case, I think these facts are fully borne out by the evidence. I agree fully with the judgment of the learned Chief Justice.

MEIN, J.: I agree with the judgments delivered by my learned brothers. It appears to me that the dealings, the correspondence and transactions between Colin Livingstone and plaintiff clearly indicate that, if anyone was appointed agent, Colin Livingstone was, and no one else. Colin did not execute the sale or transfer, or enter into the contract, and, there being no authority to Alexander Livingstone to contract for sale or execute the transfer or sale, the defendants in recognizing the act of a person without authority from plaintiff, and by means of such recognition depriving the plaintiff of his interest in the shares, inflicted an injury on him; and the value of that injury is fairly assessed at the value of the shares at the time the injury was committed. When the 200 shares were transferred, their admitted value was

With respect to the 100 shares, there is evidence that at the time these were transferred they were worth 15/-. Subsequently they went up as high as £1, and then they went down to 10/-. The average is 15/-, and I think that is a fair estimate of the injury inflicted on plaintiff by the company in respect of those shares.

Appeal allowed; judgment set aside; and verdict for plaintiff for £145 with costs.

Solicitors for appellant: *Foxton & Cardew*, agents for *Ringrose*, Charters Towers, and *Petrie*, Bowen.

Solicitors for respondents: *Daly & Hellicar*, agents for *Marsland & Marsland*, Charters Towers, and *Gregory*, Bowen.

8th March, 1887.

THE QUEENSLAND MORTGAGE AND AGENCY COMPANY, LIMITED, *v.* THE BRITISH AND AUSTRALASIAN TRUST AND LOAN COMPANY, LIMITED.

Mercantile Act of 1867 (31 Vict. No. 36) Secs. 29 and 31 — Mortgagor — Mortgagee — Attornment clause.

The owner of stock, having granted a stock mortgage over such stock, cannot, by means of a mortgage over the land, whereon such stock are depasturing, and the insertion in that mortgage of an attornment clause, give to the mortgagee of the land a power of distress derogating from the previous stock-mortgage.

Special case by parties, stated under O. XXXIV, r. 1, as follows:—

This action was commenced on the 2nd day of March, 1887, by a writ of summons, whereby the plaintiffs claimed £235, and the parties have concurred in stating the questions of law arising herein in the following case for the opinion of the Court:—

1. The plaintiffs are a limited company, incorporated and registered under the *Companies Act of 1863*, and carrying on business in the Colony of Queensland. The defendants are a limited company, incorporated and registered in pursuance of the *Foreign Companies Act of 1867*, and carry on business in this Colony.

2. At the date of the indenture next hereinafter stated, one, Edmund Dalton, a grazier, was the holder, under the provisions of the *Crown Lands Alienation Act of 1876*, of a lease from the Crown, by way of conditional purchase, of a certain station known as "Mount View" station, situate near Dalby, in the Colony of Queensland, and comprising portions Nos. 1235, 1239, 1273, parish of Palmer, county of Lytton.

3. By an indenture, dated the 25th day of April, 1884, and made between the said Edmund Dalton of the one part and the plaintiffs of the other part, in consideration of the sum of £160, advanced by the plaintiffs to the said Edmund Dalton, or immediately before the execution of the now stating indenture, amongst other things, 1,350 sheep, more or less, then running upon the said Mount View station, together with the increase thereof, were assigned by the said Edmund Dalton unto plaintiffs, their successors, and assigns, subject to a proviso for redemption on payment by the said Edmund Dalton to the plaintiffs of the said sum of £160 on the first day of April, 1885, with interest thereon after the rate of £10 per centum per annum computed from the 1st day of April, 1884, and payable as therein mentioned, and also on payment on demand, in manner therein prescribed, of all and every such further and other sums and sum of money, costs, charges, and expenses which then, or at any time thereafter, should become due, owing, and payable by the said Edmund Dalton to the plaintiffs, or should be advanced or paid by the plaintiffs to or on account of the said Edmund Dalton, and of all and every sum or sums of money to pay which a liability or engagement had been or might be entered into or incurred by the plaintiffs upon affording to the said Edmund Dalton any pecuniary assistance or money accommodation, or by any or either of such means, together with interest on all and every such sum and sums of money, after the rate aforesaid, computed from the time or respective times of the same becoming due or payable, or of the same being advanced or paid, and upon the observance and performance of all and every the covenants, conditions, and agreements therein contained on the part of the said Edmund Dalton to be observed and performed.

4. The indenture in the last preceding paragraph hereof mentioned was within thirty days after the date thereof duly registered as a stock mortgage under the provisions of the *Mercantile Act of 1867*, and has ever since remained so registered. There now remains due to the plaintiffs, upon the security of the said mortgage, a principal sum of £282 2s. 9d., together with £61 19s. 3d. interest thereon, from the respective due dates up to and inclusive of the 2nd day of March, 1887, making in all the sum of £344 2s.

5. The said Edmund Dalton has since the date of the said indenture remained in possession of the said station and the stock thereon.

6. After the date of the said indenture, but prior to the execution of the bill of mortgage next hereinafter mentioned, the said Edmund Dalton acquired the fee simple of the said Mount View station, under the provisions of the said *Crown Lands Alienation Act of 1876*, and became the registered proprietor in fee simple thereof.

7. By a bill of mortgage, dated the 22nd day of April, 1886, under the hand of the said Edmund Dalton, made and executed in form "F" to the schedule to the *Real Property Act of 1861*, he, the said Edmund Dalton, in consideration of the sum of £3,600 that day lent to him by the defendants (hereinafter called the said company), covenanted for payment of the said sum and interest thereon and otherwise as therein mentioned, and there is therein contained a clause in the words following—"and for the consideration aforesaid I, the said Edmund Dalton, do hereby attorn and become tenant from year to year to the said company and its transferees, for and in respect of the said lands hereby mortgaged, at the clear yearly rent of £306, clear of all deductions, to be paid by equal half-yearly payments on the 30th day of June and the 31st day of December in every year, without deduction, the first payment to be made on the 30th day of June next;" and after providing for the reduction of the rent upon punctual payment, and giving a power to enter and determine the tenancy upon nonpayment, it was thereby further agreed in the words following, namely, "that all rent which shall be duly paid as aforesaid during the continuance of the tenancy shall be received in lieu of interest and shall have the same effect as regards the operation of the several powers, covenants, and provisions expressed or implied herein as if the same rent had from time to time been so paid by way of interest." And for better securing the payment, in manner aforesaid, of the said principal sum of £3,600 and interest he, the said Edmund Dalton, did thereby mortgage to the defendants all his estate and interest in the said pieces of land comprising the Mount View station aforesaid.

8. The said bill of mortgage was on the 12th day of May, 1886, duly registered under the provisions of the said *Real Property Act of 1861*.

9. There was claimed to be due on the 18th day of January, 1887, to the defendants, from the said Edmund Dalton, the sum of £218 3s. 2d. in respect of arrears of rent, under clause 13 of the said bill of mortgage in paragraph 7 hereof set out, and the said sum was due and unpaid up to and at the time of the levy in paragraph 11 hereinafter mentioned.

10. On the 18th day of January, 1887, the defendants issued a warrant of distress to their bailiff to distrain the goods and chattels that should be found on the said Mount View station for the said sum of £218 3s. 2d. due to the defendants as aforesaid.

11. On the 7th day of February, 1887, the defendants by their said bailiff by virtue of the said warrant distrained on the said sum of £218 3s. 2d. 1,000 sheep then running on the said Mount View station, which station is comprised in the said bill of mortgage, and which station the defendants claim that the said Edmund Dalton then occupied as tenant to the defendants under the aforesaid clause 13 of the said bill of mortgage, being sheep assigned to the plaintiffs by and included in the said indenture of the 25th day of April, 1884.

12. The plaintiffs have paid a sum of £235, being the said sum of £218 3s. 2d., the amount of the said distress, and a sum of £16 16s. 10d. to cover expenses of the said distress, into a joint account in the names of their solicitors, Messrs. Hart and Flower, and of the defendants' solicitor, Mr. Rüthning, to abide the opinion which this Honorable Court may be pleased to express upon this special case.

The question for the opinion of the Court is:—

Whether the defendants had the right to distrain the said 1,000 sheep as against the plaintiffs.

If the Court should be of opinion in the negative, then judgment shall be entered up for the payment to the plaintiffs of the said sum of £235, so paid to the said joint account as aforesaid, and costs of suit.

If the Court shall be of opinion in the affirmative, then judgment shall be entered up for the payment to the defendants of the said sum of £235, so paid to the said joint account as aforesaid, with their costs of defence.

N.B.—Order XXXIV, r. 1. Upon the argument of the case the Court and the parties will be at liberty to refer to the whole contents of the documents stated in the case, and to draw therefrom any inference which might be drawn therefrom if proved at a trial

Power, and *Pain* with him, appeared for the plaintiffs; *Real*, and *Byrnes* with him, for the defendants.

Power submitted that the question was shortly,—if a man is the duly registered mortgagee of cattle, whether a subsequently registered mortgagee of land can take away his property in the cattle by means of an attornment clause.

He was stopped by the Court.

Real submitted that the question was whether an attornment clause had the effect of creating a tenancy. He submitted it had; and if it had, did the ordinary consequences follow by which the other mortgagees' property—the cattle—could be distrained? Did the attornment create the relationship of landlord and tenant? If so, the defendants had all the rights of a landlord.

Lilley, C.J., referred to the *Mercantile Act of 1867*, ss. 29 and 31.

Real cited *Kearsley v. Phillips and Another*, 11 Q.B.D., 621. *Morton v. Woods*, 3 Q.B., 658, and 4 Q.B., 293; *Ex parte Plunket, in re Kitchen*, 16 Ch.D., 226. No claim, right, interest, or easement was given by the *Mercantile Act* over the property on which the sheep were.

LILLEY, C.J.: The case submitted to us is as to its facts in reality in a very small compass. Dalton was a conditional purchaser under the *Land Act of 1876* of certain Crown Lands in the Colony. He had the usual lease, I presume, which is determinable on the payment of certain instalments, and when all has been paid the lessee becomes entitled to the fee simple. He fulfilled all the conditions, paid his rent, and the leasehold became merged in the higher estate in fee; he became the freeholder of the land. Whilst he was a leaseholder in the course of fulfilling the conditions to entitle him to the fee simple, he was carrying on the business of grazier. He had sheep on the demised land, and, needing money, he appears to have borrowed from the Queensland Mortgage and Agency Company. In order to secure that, having no right to mortgage the land, or not caring to do so, he mortgaged the sheep. The security thus created, under the *Mercantile Act of 1867*, the 29th and subsequent sections, appears to me of this nature: The living stock upon the land is mortgaged, and the leaseholder or freeholder, whichever he may be, when he grants the live stock, grants also that without which the security could not subsist for a single week. He gives the right of pasturage, and he gives that right, I think, on a fair construction upon the nature of the transaction, and, looking at the various provisions of the statute, during the subsistence of the security. We all know that the nature of a mortgage, whether of personalty or of realty, is this:—The money may be borrowed for three or five years, or for any limited period, but, when that expires, the mortgagee has a right to ask for his money; but he may refrain from doing so, and the mortgage subsists until the money has been paid and the mortgage has been discharged. Under this statute, section 29, certain particulars are to be registered. To my mind that means that they are to be registered for public information, and not merely as a security against persons who may steal, or against the mortgagor who may make a fraudulent use of his possession and sell the stock fraudulently. Registration being, as I think, for the information of the public, such registration with the possession of the stock would give a priority to the first mortgagee. Then there is a schedule which prescribes the kind of information which is to be given. There is to be the "date of the deed, name of mortgagor, the name of the witness or witnesses, name of mortgagee, consideration." Then come the—

Numbers and description of mortgaged sheep, cattle, or

horses, and the brand or other distinctive mark and station where the same are depasturing, as also name of principal superintendent or overseer.

Now, it is clear to my mind that the mortgagee has a right under that, when he wishes to call in his security, either within the limited time or afterwards, so long as the security is existing, to go to that particular station and see if they are there. Whatever it is to be called, a right of pasturage, an easement, a claim, or an interest—any name will suffice which will describe the thing which, to my mind, is under the statute, a right to maintain the basis of the security, which is the life of the animals which have been pledged to the mortgagee. Otherwise it would be a mere mockery if there was no right to pasturoge given at the time. It would be simply a transfer from the mortgagor to the mortgagee of the sheep, which might be taken off the station immediately and sold or otherwise disposed of without any security, subject only to the penal sections of the Act. I think the mortgagee would have the equity as against the mortgagor, and anyone knowingly taking from him a title to the land, and he would have an equity to have the stock maintained or subsisted on that land by force of the security under this statute during the continuance of the security. I see no hardship in maintaining that, if a man wishes to buy or mortgage land, especially land used for grazing purposes in a country like this, he must go and see that the title is clear, and if he can have what he wishes to have. If he wishes to have it very much, he must pay off the mortgage, get rid of the burden, and then he can have the benefit. I see no hardship in this case. It happens every day that a man finds an estate, which he wishes to buy, with encumbrances. He either takes them off or takes the estate with them. That was the state of things when the Queensland Mortgage and Agency Company got their right to the stock. What happens afterwards? After Dalton gave the mortgage over the stock he fulfilled the conditions, and by force of law became entitled to ask for the fee simple. He was then, I think, for the first time entitled to mortgage the land. He then makes a qualified sale, a mortgage of the land for a considerable amount—he gives the land as security for the principal and interest, and attorns. He attempts to create the relation of landlord and tenant, as between himself and the mortgagee of the land, and to obtain a power of distress. Now, that power of distress would enable him, if his way had been clear and free from anything like fraud and evasion, to take from the mortgaged stock from time to time sufficient to satisfy his interest under the other mortgage. The frauds that might be committed in that way are numerous. One there is which might be a very successful one. A stock mortgagor would have only to arrange with the mortgagee of the land, and say "I will always allow my interest to go in arrears and you can take it out of the stock." So that they could in that way eat up the stock and dispose of the stock mortgage. The danger here lies in upholding that power of distress. But is there really a power of distress as between these two parties, between the mortgagee of the land and mortgagee of the stock. Is there any actual relation, in fact, by any equity of landlord and tennant between the mortgagor and mortgagee of the land, as against the mortgagee of the stock. To my mind there is not. Call it what you will, tenancy or attornment, or whatever name you choose to give it, it seems to me that, for a purpose of this kind, for the purpose of defeating a stock mortgage like this, it cannot be discharged from its character in the instrument and transaction from which it arises. In equity you must look at the substance of things. If we see the substance of a thing, we will deal with it as it is, not by names. Here this attornment and so-called tenancy were included in the mortgage, and the power of distress was a mere security for the payment of the interest, and that security was to be realised upon whatever might happen to be upon the land. To my mind, therefore, with this stock mortgage subsisting and known to the parties—as I take it, it must have been, being in the register—it was in effect a security given over the already mortgaged stock

to the mortgagee of the land, to secure him the payment of his interest. If that is so, it comes within the 31st section of the statute, by which it is forbidden—

> Any lienor of wool or mortgagor of sheep so long as any mortgage or lien thereon executed by him or her shall remain unsatisfied to grant a further lien on such wool or mortgage of such sheep without the written consent of the lienee or mortgagee.

There was no consent here. I think it falls clearly within that section. Moreover, there is an equity arising on the penal section. It seems to me perfectly clear that this must "invalidate or impair the right of property" of the mortgagee in these sheep, and in "their increase or progeny." On these grounds and on the broad ground that a man cannot take away what he has once granted, I think the mortgagee of the land here could take no more than the man could give him. That was nothing, so far as it goes to defeat the title of the Queensland Mortgage and Agency Company under the mortgage. My answer to this will be that the defendants had no right to distrain these sheep as against the plaintiffs, and that the plaintiffs are entitled to judgment for £235 and costs.

HARDING, J.: I have arrived at the same conclusion, and I think that that conclusion may be arrived at in another mode from that of my learned brother The Chief Justice, and that the judgment is sustained by the reasons I will give. A man having granted a thing is not allowed afterwards to do what is commonly called to derogate from his grant. If that be so, applying the rule to this case, Dalton having mortgaged the sheep to the plaintiffs could not afterwards do anything which would invalidate that mortgage. I do not think the law would allow him to do anything with that result. Testing this case by that rule, what has he done? He has by means of a mortgage of the land and the insertion in that mortgage of an attornment clause, endeavoured to give to the mortgagee of the land a power of distress which might, and in certain cases would, absolutely defeat his grant of the stock mortgage. That being so, could the mortgagee of the land gain anything from him which he could not give? I hold that he could not, because I take it that a mortgage of stock registered under the *Mercantile Act of 1867* is notice to all persons dealing with that stock or with matters which may subsequently affect that stock. Secondly, at the time when the mortgage of the land was executed the British and Australasian Trust and Loan Company, Limited, knew that their mortgagor, Dalton, had already executed a stock mortgage, and that, if they accepted this power of distress under the mortgage of the land, they would be derogating from that mortgage. I do not think the law will allow such a thing. The law as to this question is, I think thus shortly expressed: If a person knows that another cannot do an act without derogating from his own prior act, and assists him—takes from him a grant to that effect—he will be in the same position as if no grant had been made. Consequently, the British and Australasian Trust and Loan Company, Limited, took nothing that Dalton had not to give, and he certainly had not power to derogate from his grant of the stock mortgage. While, at the same time, agreeing with the grounds expressed by the learned Chief Justice, I think the grounds I have just stated are sufficient alone to support the judgment of the Court as pronounced by him.

MEIN, J.: I agree in the conclusions arrived at by the other members of the Court for the reasons so fully given by my learned brother, The Chief Justice.

Solicitors for plaintiffs: *Hart and Flower.*
Solicitor for defendants: *Rüthning.*

10th March, 1887.

In re ROBERT HENRY DYBALL, A SOLICITOR.

Solicitor—Misconduct of.

In this case the solicitor had received a large sum of money for the purpose of discharging a mortgage over property which the client had purchased, but instead of discharging the said mortgage he retained the money in his hands for a period of six months, and made several false statements respecting the disposal of the same.

Held, that such misconduct was a sufficient ground for striking the solicitor off the Roll, and that the court will require from its officers fidelity to trust.

MOTION to make absolute a rule *nisi* calling upon Robert Henry Dyball, a solicitor of Bundaberg, to show cause why he should not be struck off the Roll of Solicitors of the Court, or why he should not answer the matters charged in affidavits filed in the matter. The rule *nisi* was granted by the Full Court at the February Sittings. The facts of the case are briefly, that on the 3rd May, 1886, one John George Moeller, licensed publican of Mt. Perry, paid Mr. Dyball £228 4s. 9d. for the purpose of redeeming a Bill of Mortgage made by one David Pollock in favor of one R. B. Ridler, over certain land, and for the purchase of the land. Acting on instructions, Dyball had, prior to the payment of this money, prepared a release and a Bill of Mortgage, over balance of the land for Moeller, but up to the 13th October, 1886, Moeller had never received his title deed nor mortgage from Dyball, although he had applied to him therefor several times both verbally and by letter. Moeller had also enquired from Dyball several times whether he had paid over the sum on the original mortgage; and in reply to these enquiries, Dyball, in August and September, 1886, had stated in one telegram that the money had been forwarded to his agents in Brisbane; in another, implying that there was delay in payment by his agents, that they, if causing the delay, would pay interest; later, that his agents had written to him informing him that the purchase had been settled, and that the delay was theirs; and finally, that he was going to Brisbane to enquire into the matter. On further enquiry in Brisbane, Moeller learned that his money had never been forwarded to Dyball's agents there, nor in fact that they knew anything of the transaction. He placed the matter in the hands of another solicitor, Mr. A. F. B. Chubb, and the money had been repaid by Dyball.

3 Q.L.J. 36
4 Q.L.J. 50
4 Q.L.J. 176

Lilley, on behalf of the Queensland Law Association, moved the rule absolute. He cited the following cases referred to by him when moving for the rule *nisi*:—*In re Wright*, 12 C.B., N.S., 705; *In re Blake*, 30 L.J., Q.B., 32; *In re Chandler*, 25 L.J., Ch., 396; *In re Hill*, 3 Q.B., 543, at p. 546; and *In re H.*, 31 L.T., N.S., 730.

Power, and *Real* with him, appeared to answer the rule on behalf of Mr. Dyball.

Power read affidavits admitting the facts alleged, and pleading worry and anxiety on account of a relative's serious illness, which interfered with the discharge of his client's business. It was submitted that Mr. Dyball had not revealed the names of his agents, when throwing the blame of delay upon them; *Goodwin v. Goswell*, 2 Collyer, 47. Mr Dyball threw himself upon the mercy of the Court.

Real followed. It was a case for the mercy of the Court. Mr. Dyball had not attempted to keep the money, nor to defraud his client.

Lilley: The Law Association did not wish to press the matter; and would leave it as a question of punishment to the Court.

The Chief Justice intimated that as it was a very serious matter, the Court would take a little time to consider it.

C. A. V.

On Monday, 14th March, the judgment of the Court was delivered by

LILLEY, C.J.: This is a matter of a solicitor and of his alleged misconduct. There is now no occasion for any further concealment of the name. The solicitor, Robert Henry Dyball, was admitted in England in 1882, and later in the same year obtained admission to the Roll of Solicitors of the Supreme Court of Queensland. We must here judge entirely in the public interest; no matter of personal regard or sentiment relating to the solici-

tor himself, who is a young man of the age of 26 years, must in any way influence our decision.

The rule in this case calls upon him for alleged misconduct to show cause why he should not be struck off the Roll of Solicitors, or why such other order as may be just should not be made in the matter. The complaint against him is, that having received a sum of £228 4s. 0d. from a client for the purpose of discharging a mortgage over property which the client had purchased, he retained it in his possession for six months, did not discharge the encumbrance, and made false statements respecting the disposal of the money. He alleged various excuses for delay, the chief of them being that he had paid the money into the hands of his agents in Brisbane, through whose delay the matter had remained unsettled; but as they would he said compensate the client for the delay, it was not until after pressure was brought to bear upon him that he paid the money, and that the transaction was completed for the client. In answer to that, the solicitor has made an affidavit, and he has produced partial corroboration in matters perhaps not very material. In his own he has alleged that he allowed the matter to remain unsettled by reason of negligence, which was caused from having a relative engaged in sugar planting, and very ill from rheumatism and other ailments, and that he was so busily engaged in his relatives's business as to neglect his own. We are compelled painfully to declare that we believe that to be entirely false, not that there is any falsehood as to the illness of the relative, or to the solicitor being engaged in his affairs; but that either one or the other caused him to neglect his duty to his client we do not believe.

The letters and telegrams of the solicitor himself which passed from May to November, during which the matter was in suspense show clearly that his present excuse is without foundation. The money was received in May and was not paid over until November. The solicitor in his affidavit, as I have stated, says that the client "never made any demand to me to return the said sum to him until the 30th day of October, 1886, nor did he ever before that date make any communication to me on the subject, to lead me to believe that the said matter was urgent or that he was annoyed or anxious at the non-completion thereof."

Now compare that with the actual evidence under the solicitor's own hand before us. On the 31st of the 8th month, that is, in August, before the October of which he had spoken in his affidavit, he writes this letter to Coates, manager of the Queensland National Bank, Bundaberg:—

DEAR SIR,—I have forwarded Mr. Moeller's money to my agents in Brisbane, who are in communication with Mr. Rüthning as to obtaining the release referred to. If the matter is not settled I will ask them to return the amount. I will write by to-day's mail.

Yours faithfully,
ROBERT H. DYBALL.

Now, it is perfectly clear, even from that letter alone, that something had been stirred by the client in respect of his money. On 10th August we find a message from him to the client himself:—

August 10.

Message for J. G. Moeller, Royal Hotel.

I have written Brisbane full enquiries as to delay. If caused by my agents I will pay extra interest. If by mortgagee he will not claim it. You shall not suffer in any event. Goodwin returning to-night. Have room ready.

R. H. DYBALL.

Then again on September 10—

Message for J. G. Moeller.

My agents write Pollock's purchase money being settled. Delay was theirs; and they pay interest from May.

R. H. DYBALL.

Then again on September 24—

Message for J. G. Moeller.

Am going to Brisbane to enquire into your matter.

R. H. DYBALL.

It is clear to our minds that the facts are these:—In April, he had entered into an arrangement to assist his relative; in May, he received this money from his client. He alleges he mixed some of his money with his client's. Well, we are inclined to think he had mixed his client's money with his own, and having done so, he used the fund for the purpose of assisting his relative and himself in the sugar enterprise, and so was guilty of gross breach of trust.

Now, we have had to deal with misconduct of

officers of the court at other times, and in the latest example of this kind, *In re Swanwick*, the court declared the nature of the jurisdiction it exercises in these cases, and the consequences solicitors may expect if they are guilty of misconduct of this kind. It is needless to lay down the nature of all the cases in which we will interfere to protect the public from the misconduct of officers of the court. One thing is perfectly clear, we must require from our officers fidelity to trust; for, in any failure in that respect, and if the severest form of the court's jurisdiction should be exercised against the officer, he has no reason to complain. There have been many examples in England, and we have unfortunately had a few examples here of officers going away from the path of rectitude, and suffering from the court's jurisdiction.

In re Swanwick, 1 Q.L.J., 117, the judgment of the court was as follows: The Chief Justice in delivering the judgment of the Court, said:—

The Supreme Court is the arm of the law. It is, in fact, the embodiment of the legislative will of the country, entrusted with the administration of the law of the colony, and for that purpose invested with most extensive and important functions. It is clear, of course, that the judges of the Supreme Court themselves cannot carry out all the behests of the legislature. They must depute to ministers and agents the setting of the law in motion for the purpose of carrying out the procedure of the court and the execution of its judgments when pronounced. It is essential that the court itself should be constituted of men of the highest honor, and it is not less essential that the inferior agents and ministers of the court should also be men of the highest probity and honor. It is only by securing such men in the administration of justice that the court can hope to make its function beneficial to the public. If we do not insist upon the most scrupulous honor amongst the members of the bar, and throughout the whole body of attorneys and solicitors of the court, we know well by experience that we shall expose the public to malpractices of the most oppressive and unjust character. It is needful, therefore, that the control which the court has over its officers should be exercised with the greatest possible strictness, doing no injustice to the practitioner whose conduct may be complained of, but insisting on every occassion when complaint is made that he shall clear himself from all taint of dishonor, and stand clear before the court and the public. The powers of the court are great, and among the less instructed portions of the community, the person of a barrister or an attorney, or legal practitioner, is invested with some dim idea of great power, and, I believe, looking at the conduct of the general body of practitioners, that they also accept any act of his as one which he is lawfully authorised to do. It is possible and probable, therefore, that many oppressions may be carried out by ministers of the court and not be complained of, simply because those upon whom they are inflicted are ignorant not only of the power of the court to restrain its ministers within the law, but of its determination to do so when any complaint is made against them. . . . . We exercise the control over the honor of the profession, and it is not essential to the exercise of our jurisdiction that a practitioner should have been guilty of a statutory offence; it is enough, if in the judgment of the court he has been guilty of such conduct as renders him unfit to remain upon the roll of the court—to be entrusted, in fact, with the power of the court which he can set in motion in certain particulars at any moment The legislature has granted to practitioners a monopoly. They must be qualified by character and attainments to appear in this court, and in any of the courts of the colony. From this court they receive their authority to appear for persons in all courts of the colony, and if they are not persons of good fame and character they cannot obtain admission to the profession if their real character be known to the court. And so if they do not after admission continue in a course of honorable conduct, such conduct as in the opinion of the court justifies us in leaving in their hands the authority committed to them as our officers or agents, the court will take steps to remove them from their office, not on its own motion, but on complaint made to the court and justified by evidence.

I am happy to say that in the profession to which we have the honor to belong our brethren have been careful hitherto at their own expense and by the foundation of a society, which may be looked upon as one of vigilance, to protect themselves, their brethren, and the public, as far as possible, from the evil practices of misdoing members of their body. The legal profession is the only profession in which at their own expense and at great trouble, and no doubt much anxiety, the members protect the great body of the public from the evil members of the profession,—from men who either whilst honorable obtained admission to the profession, and then fell into evil ways, or men who by some means obtained admission to the profession, when they ought really to have been excluded, but who, when once in, have not the virtue and resolution to restrain their conduct. In *Goodwin v. Goswell*, in the English courts, 2 Collyer, 47, the Vice-Chancellor made some observations which I thoroughly endorse. He says, speaking of our profession, that it is,—

A profession, the powers of which for good or ill, as far as the worldly interests of the mass of mankind are concerned, can scarcely be too strongly stated; a profession owning, I am happy to be able to say, so many men who would do honor to any calling, and who, well aware that sincerity and integrity are the surest guides to prosperity and distinction, are true and just from higher motives and less worldly considerations . . . a class meriting and receiving the countenance and protection, the respect and esteem of those in whose hands is placed the administration of justice, among not the least urgent of whose duties on the other hand it is to mark, to censure, to repress, and, if necessary, to extirpate from the Courts such men as, by abusing the functions and privileges of so important a profession, become a scandal and pestilence to society

The ruling of the court is that this solicitor, Robert Henry Dyball, be struck off the Roll of Solicitors of the Supreme Court; that his commission as a Commissioner for Affidavits be cancelled, and that he be removed from all offices of trust that he may possibly hold as an officer of this court, and that he pay the costs of this motion.

Power: Would your Honors allow Mr. Dyball to collect his outstanding costs up to date?

LILLEY, C.J.: No, we make no order except that he be struck off the rolls and pay the costs.

Solicitor for Law Association: *Osborne.*

Solicitors for R. H. Dyball: *Bunton & Little.*

IN INSOLVENCY.

LILLEY, C.J. 11th March, 1887.

In re DAVID LYON, AN INSOLVENT.

Insolvency Act of 1874 (38 Vict., No. 5)—Trustee —Removal of—Proof of Debt.

Under the *Insolvency Act of 1874*, on an application for the removal of a trustee, a creditor can, unless he has lost his status by *laches*, or other sufficient cause, or by adjudication elsewhere, come into the Court and prove his debt, even though he has not proved before the trustee.

MOTION to remove trustee on behalf of a creditor who had not proved his debt.

Real, on behalf of Edwards, a creditor of insolvent, applied to remove McBride, the trustee in the estate, on the ground that he was a partner of the insolvent, and, therefore, not a fit person for the office of trustee. He cited *Ex parte Barnett*, 2 Mont. D. and D.G., 292.

Lilley, for the trustee, opposed and took the preliminary objection that the creditor had no *locus standi*. There was a statutory provision for relieving debtors of their liabilities; and under that there was a statutory form of proving debts. If a creditor had not properly proved his debt and secured the admission of that proof, he had no *status* as a creditor in this estate for such an application as this. *Barnett's* case was overruled in *Ex parte Morse*, D.G. Bankr. R., 478. He cited also *Ex parte Meiszner*, 10 L.T., N.S., 354.

LILLEY, C.J., said, on this point,—In a matter of this kind, unless a man has lost his *status* as a creditor by *laches*, or other sufficient cause, or unless there has been an adjudication on his case elsewhere,—unless he is *sub judice*—he can come in and prove his debt before me. This creditor has now proved his debt before me; that is sufficient.

An order was subsequently made to remove the trustee, and that the creditors proceed to the election of another person on a day to be fixed by the Registrar. Costs of both parties out of the estate.

Solicitors for the creditor: *Lilley and O'Sullivan.*

Solicitor for the trustee: *Byram.*

APRIL SITTING OF THE FULL COURT.

SWANWICK *v.* MILLS.

The Larceny Act of 1865 (29 Vict., No. 6) Sec. 107.

An advertisement appeared in *The Telegraph* newspaper, of which the appellant was the printer, in these words:—"Lost, from 46 Charlotte Street, black and tan terrier pup. Finder handsomely rewarded; no questions asked," contrary to the provision of Sec. 107 of 29 Vict., No. 6.

Held, that the words "Lost a black and tan terrier pup" amounted to *primâ facie* evidence against the appellant that a dog had been lost.

Held also, that an action will lie against both the printer and the publisher of an advertisement, within the meaning of the said section, and although the printer and the publisher be one and the same person, he commits two separate offences by printing and publishing such an advertisement.

THIS was an action tried before The Hon. The Chief Justice at the March Civil Sittings in Brisbane; and was brought by plaintiff against defendant as the printer of *The Telegraph* newspaper, under the provisions of the *Larceny Act of 1865*, sect. 107, for printing in the issue of that paper on August 6th, 1886, the following advertisement:—

Lost, from 46, Charlotte Street, black and tan terrier pup. Finder handsomely rewarded; no questions asked.

On the hearing, The Chief Justice had directed a verdict for plaintiff; and judgment for £50 and costs had been entered accordingly.

His Honor held that proof of actual loss or stealing of the dog was not necessary on the part of the plaintiff.

Power, *Byrnes* with him, on behalf of the appellant, the defendant below, now moved for a judgment of non-suit; that the judgment for plaintiff for £50 be set aside with costs; or that defendant might be at liberty to plead the judgment recovered in a previous action against him as publisher of *The Telegraph*. He submitted that there was no offence under section 107 of the *Larceny Act*, which is a penal clause, unless there was proof of loss or stealing of the property. If there was, it was not framed to catch both printer and publisher for one offence.

Harding, *J.*, referred to *Cripps v. Durden*, 2 Cowp., 640.

Byrnes followed. The section compelled the construction that there must be evidence of a losing or stealing; the advertisement must be in respect of property lost or stolen. The pup may have been lost or not; *The Telegraph* did not, by admitting it and publishing it in their columns, tell the world at large that that advertisement was true.

Lilley, *King* with him, for respondent, the plaintiff below, were not called upon.

HARDING, J., in delivering judgment, said: This is an appeal from a judgment in an action tried by His Honor The Chief Justice, the plaintiff being F. ff. Swanwick, and the defendant C. Mills. In that action the plaintiff stated that on the 6th of August, 1886, a certain advertisement in these words,

Lost, from 46, Charlotte Street, black and tan terrier pup. Finder handsomely rewarded; no questions asked.

appeared in *The Telegraph*, of which the defendant was printer. His Honor gave judgment for the plaintiff. The action was brought under sect. 107 of the *Larceny Act*, which enacts that,

Whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of £50 for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit.

His Honor held that it was unnecessary to prove, in order to support the claim, that a dog had been lost or stolen. Whether or no it was necessary to construe the statute to that extent, I do not consider it was necessary in order to support the present action. Although possibly and very probably His Honor's ruling was correct, my decision turns upon these circumstances:—In proof of the plaintiff's case the advertisement was put in, which states as follows,—Lost, * * * black and tan terrier pup. That having been put in as published by the defendant amounts in my mind to *primâ facie* evidence against defendant in the nature of an admission by him that such a dog had been lost, and at all events supported the action until the contrary was proved. In other words, the onus of proof was shifted from the plaintiff to the defendant, and it lay upon the defendant to prove that such a dog had not been lost. His Honor accordingly held that a dog had been lost; and in my opinion that was sufficient to support the action.

Then it has also been contended by the defendant that an action had been brought on the same advertisement by the same plaintiff for a penalty under the same section in respect of the publica-

tion of this advertisement. The defendant says, in answer to that, we have already suffered judgment against us for the publication; you cannot now sue us for the printing. That depends on the construction of the latter part of the section. I have read "or shall print or publish;"—in order to support the defendant's contention that "or" must be changed to the word "and," and the section must read "print and publish." I think that "or" makes the section disjunctive; the words "print or publish" mean two different functions, and that whether the paper is printed and published by the same person, or printed by one and published by another, makes no difference. The man who prints it, whether he be the same or not as the publisher, is forbidden to print the advertisement; and the man who publishes, whether he is one and the same or not as the printer, commits a separate offence in publishing it. I consider that the first is no bar to the second. On the whole, I think the judgment must be supported with the usual result, that defendant must pay costs.

MEIN, J.: I am also of opinion that this appeal should be refused with costs. It appears to me that the last portion of the section was framed in the interests of public morality; and that any person, who either prints or publishes an advertisement professing to offer a reward for stolen property, with the condition attached that no questions will be asked, should be liable to the penalty imposed with costs. Printing and publishing are not contemporaneous acts. First printing takes place; then publishing, after the lapse of an interval of time. As pointed out by The Chief Justice and conceded by counsel for the appellant, printer and publisher are not one and the same person; and it was conceded that, where not identical, each would be liable to a separate penalty. That admission, I think, puts the appellant out of court. If the law says a man shall not do a certain thing, and, when he does, shall be liable to a penalty, and that man goes for and does an additional thing, which is forbidden, he becomes liable to a separate penalty. If, after printing, he goes on and publishes, he is liable to the full penalty under the statute. On that I think the appellant fails. On the first point, it is said that the onus is thrown on the plaintiff of showing that the article advertised was in fact lost or stolen. In this case the appellant has printed a public advertisement in which it is stated as a fact that a certain dog has been lost, and that a reward will be given for its return, and "no questions asked." If we were to hold that it was necessary for the person who sues for the penalty in all such cases to prove the fact which has been admitted by the advertiser, we would in most instances make this Act a dead letter. The object of the Legislature is that a person who makes admissions is estopped from denying the fact in an action of this sort. It is a *primâ facie* admission on his part of the statement made. If he had pleaded that there was no loss of an animal from 46, Charlotte Street, I am inclined to think that, if he had proved that in evidence, plaintiff would have been out of court. But there was no plea nor evidence of the kind in this case; and, as in all other cases, the appellant is estopped by his own admission. I think he has failed in his appeal.

LILLEY, C.J., said: It is hardly necessary perhaps for me to deliver a judgment at any length on the matter, as I agree entirely with the judgment that the motion must be dismissed with costs. I adhere to my opinion that, where an advertisement of this kind is inserted in a public print, stating that an animal has been lost or stolen,—I here differ from my brother Mein—it would be no answer, even by way of plea, that no animal had been lost or stolen. I think a defendant is precluded, as against an informer, by his own statement that an animal is lost or stolen. That is my opinion; I consider it is an absolute estoppel. As to the remainder of the judgment, I feel it is perfectly clear that the policy of the latter part of the statute is, as pointed out by my brother Mein, to stop persons from encouraging others to publish these advertisements, announcing that they are willing to compound a felony. To throw upon the informer the onus of proof would be a great and unnecessary demand, which he would generally

be unable to satisfy. There is no name of the person who, in this instance has lost the animal. How is an informer to prove the loss under these circumstances? There is generally only the advertisement—nothing but that—that an animal has been lost or stolen, and that, if the person having it will take it to a particular place, no questions will be asked. The statute, it seems to me, is directed against a breach of duty—the immorality of printing or publishing an advertisement that a person is willing to compound a felony. It is directed also to the repression of anything that will prevent the discovery, conviction, and punishment of a person who has committed a felony. I agree with my learned brothers, except in that expression of opinion of my brother Mein that—of course I express only my individual opinion—it would be a defence to say the dog had not been lost or stolen. The question is still open to an enterprising pleader who cares to try it.

Solicitors for appellant: *Chambers, Bruce, and McNab.*

Solicitor for respondent: *Winter.*

MAY SITTINGS OF THE FULL COURT.

COANE *v.* GILL, HOWARTH, DAVIS, EDEN, AND THE NORTH-WEST DISRAELI GOLD MINING CO., LTD.

Demurrer—Secretary of Company—Fiduciary Relationship of—Parties to Action.

The North-west Disraeli Gold Mining Company, formed for the purpose of purchasing and working a gold mining property, purchased the lease of a mine, and worked the same till June, 1886, with the defendant G. as secretary. The defendant G. then, finding that the property had become forfeitable, but not forfeited, proceeded, in collusion with the other defendants (as alleged by the plaintiff) to obtain, and did obtain, actual forfeiture of the property, and afterwards applied for a lease of it to his client, the defendant H., who has got possession, and is working it with the plant of the company for his own benefit or that of others, and not for the benefit of the company.

Held, that the defendant G. was a fiduciary or confidential agent, and could not acquire his master's property for himself or others in collusion with him.

Held also, that a person in a representative position, who would ordinarily be the proper party to sue, cannot do so when his own acts and conduct are impeached; and that relief may be obtained at the suit of a party beneficially interested in the proper performance of his duty.

DEMURRER by defendants to plaintiff's statement of claim. The pleadings are as follow:—

STATEMENT OF CLAIM.

The 30th day of March, 1887.

1. The plaintiff is a shareholder in the defendant company, and sues on behalf of himself and all other shareholders in the defendant company except those who are defendants.

2. The defendant company is a company limited by shares, and registered under *The Companies Act of 1863*, and was carrying on business in Queensland, but is now being wound up voluntarily. The defendant, Francis Gill, was, at the dates hereinafter mentioned, the secretary, and is now the liquidator of the defendant company. The defendant, John Howarth, was at the dates hereinafter mentioned, and still is clerk to the defendant, Francis Gill. The defendants, Henry Lee Davis, and David Ralph Eden, are shareholders in the defendant company.

3. The defendant company was incorporated on the 6th day of December, 1884, and the objects of the company as stated in the memorandum of association, were to purchase and work the gold mining property known as North West Disraeli Lease, and generally to carry on the business of a mining company. The nominal capital of the company was £24,000, divided into 24,000 shares of 20/- each.

4. The lease of the said mine, which was gold mining lease No. 492, and which mine is situate at Rishton, on the gold field at Charters Towers, was purchased by the defendant company, and duly transferred to them from Robert Hayles, Samuel John Peck, Mordaunt Oakden, and the plaintiff, at the price of 6,000 shares (part of the said 24,000 shares) in the company issued at, and taken to be paid up to the value of 10 - per share, a promissory note for the sum of £500 at six months after date, which date was at or about the date of the said incorporation; and a sum of £1,500 to be paid out of the proceeds of the first gold which might be obtained from the mine.

5. The said mine was worked by the defendant company up to and until the 30th day of June, 1886, or thereabouts. The affairs of the company were then managed by a board of directors in Brisbane, with the defendant, Francis Gill, as their secretary, also in Brisbane; and a local agent in Charters Towers, one Edward David Miles.

6. On or about the said 30th day of June, 1886, the defendant company ceased to work the said mine in accordance with the regulations for the management of gold fields under the *Gold Fields Act of 1874*.

7. Between the said 30th day of June, 1886, and the 12th day of July following, the defendant, John Howarth, who was then a clerk in the employment of the defendant, Francis Gill, and who had habitually conducted the corres-

pondence on the defendant company's business between the defendant, Francis Gill, and the said Edward David Miles, wrote to the said Edward David Miles, as such agent for the company as aforesaid, a letter directing him to apply under the 89th of the said regulations for the management of gold fields for the forfeiture of the company's lease.

8. The said letter was written by the direction or with the privity and approbation of the defendants, Francis Gill, Henry Lee Davis, and David Ralph Eden, and these three defendants acted in collusion with the defendant, John Howarth, in this matter, and also in the matter of the application No. 736, for a new lease hereinafter mentioned.

9. On the 12th day of July, 1886, the said Edward David Miles, in pursuance of the said letter, made an application to the warden for the said forfeiture.

10. The warden forthwith sent a telegram to the defendant, Francis Gill, as such secretary of the defendant company as aforesaid, giving him notice that such application for forfeiture had been made, and would be heard by him the warden, on the 30th day of July, 1886.

11. The said telegram was duly received by the defendant, Francis Gill, but neither he, nor the defendant company, by him, or any other officer of the company, made any objection to the said forfeiture.

12. The plaintiff and the said Robert Hayles, as shareholders in the defendant company, protested against the said forfeiture, and lodged an objection in writing against it with the defandant, Francis Gill, as secretary.

13. The minister refused to recognise differences between the shareholders in the company, and early in the month of August, 1886, granted the forfeiture.

14. Prior to the 25th day of August, 1886, the defendant, Francis Gill, being then secretary to the defendant company, sent a telegram to the said Edward David Miles, directing him to apply for a new lease in the name of the defendant, John Howarth, of the land which had been comprised in the forfeited lease, and on the said 25th day of August, 1886, the said Edward David Miles made application accordingly, such application being No. 736.

15. The said land has, since the date of the said application No. 736, been held by the defendant, John Howarth, thereunder, and has been worked by him or in his name for his own benefit or for the benefit of persons other than the defendant company, and in so doing he has made use of the engine, plant, and tools of the defendant company.

16. On the 7th day of October, 1886, at an extraordinary general meeting of the shareholders of the defendent company a resolution was passed to wind up the company voluntarily, and the defendant, Francis Gill, was appointed liquidator.

17. Prior to the commencement of this action the plaintiff applied to the defendant, Francis Gill. as secretary and liquidator to the defendant company, to take steps to call an extraordinary general meeting of the company for the purpose of proposing a resolution that an action, in which the same relief should be claimed as is claimed herein, should be commenced by the defendant company, but the said defendant declined to take such steps unless the plaintiff paid him the sum of £3 3s., which the plaintiff refused to do.

The plaintiff claims :—

1. A declaration that the defendants, or some or one of them, are or is trustees or trustee for the plaintiff; and the defendant company of the gold mining leasehold at Rishton, on the gold field of Charters Towers, now held by the defendant, John Howarth, by his application, No. 736, for a gold mining lease thereof.

2. An account of the profits (if any) received by the defendants or any of them in respect of the said mine.

3. An injunction restraining the defendants or any of them from transferring, selling, offering for sale, or otherwise disposing of the said gold mining leasehold, and from selling, offering for sale, or otherwise disposing of or removing from the land comprised in the said application, any gold or other material taken from the said mine.

4. That a proper person may be appointed to receive the profits of the said mine.

5. Such further and other relief as the nature of the case may require.

DEMURRER.

The 7th day of April, 1887.

The defendants demur to the plaintiff's statement of claim and say the same is bad in law, on the ground that it does not show that any fiduciary relationship ever subsisted between the plaintiff and the defendants in respect of the leasehold ground in the statement of claim mentioned. And on the ground that application for lease No. 736 was not subject to any trusts or equities in favor of the plaintiff or the defendant company. And on the ground that it is not competent for the plaintiff to sue herein on behalf of himself or on behalf of the company or any of them. And on the ground that the allegations in the statement of claim do not show any cause of action, in respect whereof the plaintiff is entitled to sue the defendants, or to which effect can be given by this Honorable Court against them. And on the ground that the relief sought by the statement of claim cannot be given at the suit of the plaintiff or any person or persons other than the company. And on other grounds sufficient in law to maintain this demurrer.

Real, and *Pain*, with him, appeared on behalf of the plaintiff; and *Byrnes* on behalf of the defendants.

Byrnes submitted that the demurrer was that no fiduciary relationship was shown to exist between plaintiff and any of the defendants; that the application for the new lease was not subject to any trusts or equities in favor of plaintiff or of the defendant company; that it was not competent for the plaintiff to sue on behalf of himself or of the shareholders.

Real referred to the powers of the official liquidator, and the consequences of winding up under the *Companies Act of 1863*, sections 94, 123, subsection 7, and section 129.

Byrnes: The plaintiff could not claim a greater relief than the company could. *Buckley on Companies*, ed., pp. 438–9. There was no application to the court to use the company's name. The liquidator was not bound to summon a meeting of shareholders. The company was the party to sue. The whole of the facts were perfectly consistent with innocence. The company had ceased to work; working was defined in regulations 37 and 85 of the *Gold Fields Act of 1874*. After the interval of twelve days the property was forfeited; anyone could have applied for it. However bound to the company, the defendants were under no obligation to plaintiff. *Little v. McDonald*, 1 Q.L.J., 124. Defendants had not the ground; of what were they to be declared trustees? If the plaintiff's claims were granted, the company would be obliged to work the claim; they could not do so under section 121 of *The Companies Act*.

Real referred to section 7 of the statement of claim, as to the interest of the defendants. Gill, as secretary, occupied a fiduciary relation towards the company. *Martinson v. Clowes*, 21 Ch.D., 857. An agent cannot deal with the estate of his principal so as to benefit himself as against his principal.

HARDING, J., referred to *Daniel's Chancery Practice*, p. 232.

Real: Their application for forfeiture was an illicit act by the company's secretary against the company's property. He first obtained its forfeiture, and then with the others went for it for themselves. The suit was "on behalf of self and shareholders." *Mason v. Harris*, 11 Ch.D., 97, following *Menier v. Hooper's Telegraph Works*, 9 Ch.App., 350. The rule was expressed in *McDougal v. Gardner*, 1 Ch.D., 13. The company was gone; and could not bring an action; but the liquidator could. He refused to call a meeting, and was a party to the transaction impeached. *Attwood v. Merewether*, in note to *Clinch v. Financial Corporation*, 5 Eq., 464, at 468, referred to.

Pain followed, and cited *York & N. Midland Railway Company v. Hudson*, 16 Beav., 485, at 491, as distinguishing this case from *Little v. McDonald;* also *Williams v. Stephens*, 1 P.C., 359.

Byrnes in reply. It had not been contended that an agent at arm's length from his principal could not acquire the latter's property. The fiduciaries were only fiduciaries for the company, not for plaintiff. The forfeiture had been acquiesced in by the company. A general meeting was held in October, and plaintiff did not take the sense of the company; *Russell v. Wakefield Waterworks Co.*, 20 Eq., 474, *per* Jessel, W.R., p. 482.

C. A. V.

LILLEY, C.J., delivered the judgment of the Court on the 7th June, as follows:—

This is a demurrer to the plaintiff's statement of claim on two grounds—first, that it discloses no equity or cause of action in the plaintiff against the defendants; second, that the suit is improperly constituted, inasmuch as the company, if there is a cause of action, is the proper plaintiff. The action is brought by Coane, on behalf of himself and the other shareholders of the company, under these circumstances:—The company was formed to purchase and work a gold mining property and generally to carry on the business of a mining company. A lease of the mine was purchased by the company, and the mine was worked until June, 1886. The defendant Gill was their secretary, defendant Howarth was his clerk, and one Miles was the local agent of the company at Charters Towers. The business was managed by directors in Brisbane, where the defendant Gill discharged the duties of secretary, and through defendant Howarth carried on the business correspondence of the company with their local agent Miles. The company ceased to work the mine in accordance with the gold fields regulations, and, although not expressly stated, it may be fairly deduced from the statement of claim the lease became liable to for-

feiture. The defendant Howarth then, "by the direction or with the privity and approbation" of the defendant Gill, wrote to Miles directing him to apply for a forfeiture of the company's lease. It is alleged that the defendants Gill, Davis, and Eden acted in collusion with the defendant Howarth in this matter, and also in the matter for a new lease. Miles made an application to the warden for the forfeiture of the lease, and the warden sent notice to Gill, as the company's secretary, that the application had been made and would be heard by him. The notice was received by Gill, but neither he nor the company nor any of their officers made any objection to the forfeiture. The plaintiff and Hayles, another shareholder, protested against the forfeiture, and lodged an objection with Gill as secretary. The lease was forfeited in August. In the same month the defendant Gill directed Miles to apply for a new lease in the name of the defendant Howarth. Miles accordingly made the application, and since that date the mine has been held and worked by the defendant Howarth under the application "for his own benefit or for the benefit of persons other than the defendant company, and in so doing has made use of the engine, plant and tools of the defendant company." In October, 1886, the company went into voluntary liquidation, and Gill was appointed liquidator. Before commencing this action the plaintiff applied to Gill, as secretary and liquidator, to call a meeting of the company for the purpose of proposing a resolution to seek the relief claimed in the present action. Gill declined to do so unless the plaintiff paid him £3 3s. It does not appear that he was entitled to make any such demand. The relief sought is a declaration that the defendants are trustees of the mine for the plaintiff and the company under Howarth's application for a new lease. Concisely stated the case for the plaintiff is that the secretary or confidential agent of the company, finding the property became forfeitable but not forfeited, proceeded in collusion with his clerk and the other defendants to obtain actual forfeiture of the property, and applied for a lease of it to his clerk, who has got possession, and is working it with the plant of the company for his own benefit or that of others, but not of the company, and it is in effect alleged that, if such a transaction stands at all, it must be for the advantage of the principals (the company), and not of the agent and those in collusion with him, and that they ought to be declared trustees for the company, or the shareholders on whose behalf the action has been brought. It is only necessary to state the proposition in this way to perceive at once that in any system of law in which equitable principles prevail there is a clear claim to relief against the transaction. There are abundant precedents applicable to every description of agency to show that the fiduciary or confidential agent, in consequence of the confidence reposed in him, must abstain from selfish projects, and cannot acquire his master's property for himself or others in collusion with him. There is a direct conflict of interest and duty under such circumstances, and in equity we cannot suppose the agent to have acted with the utmost good faith and integrity and devotion to his master's interest in such a transaction. In a case, such as this is said to be, the secretary would be constantly interested in watching for occasions of forfeiture of his master's property. On this point then—the alleged want of equity—the demurrer must be overruled. But it is said the action is not properly constituted, as it should have been brought in the name of the company, and not of one shareholder suing for himself and others. This is true as a general rule, but important exceptions have been established in the interests of justice. The cases of *Meiner v. Hooper's Telegraph Works*, *Mason v. Harris*, and other authorities cited in the argument by Mr. Real, abundantly establish this exception. The defendant Gill has refused, either as secretary or liquidator, to call a meeting of the company for the purpose of obtaining authority to sue in the name of the company, and, if such authority were obtained and the defendant Gill were to commence an action in the name of the company against himself and the other defendants, what diligence or good faith could be expected in the conduct of an action practically by a man against himself for breach of

his own confidential obligation to his employers? It is old equity that a person in a representative position who would ordinarily be the proper party to sue cannot do so where his own acts and conduct are impeached, and that relief may be obtained at the suit of a party beneficially interested in the proper performance of his duty (*Travis v. Milne*, 9 Hare, 150, cited and approved by Lord Selborne, in delivering the judgment of the Judicial Committee of the Privy Council in *Benningfield v. Baxter*, 12 Appeal Cases, L.R). Demurrer overruled, the defendants to pay the plaintiff's costs.

Solicitors for plaintiff: *Daly & Hellicar*, agents for *Marsland & Marsland*, Charters Towers.

Solicitors for defendants: *Chambers, Bruce & McNab.*

IN CHAMBERS.

HARDING, J. 13th May, 1887.

HAYTER *v.* BREWER.

1903 St R Qd 131

Federal Council Act, No. 4, sects. 4–8.

A plaintiff, resident in a colony subject to the *Federal Council Act*, sued in another colony also subject thereto, will not be required to give security for costs unless other circumstances are shown.

SUMMONS for security for costs from plaintiff resident in Victoria.

Mansfield, for defendant, applied on summons for an order that plaintiff do give security for defendant's costs of action to the satisfaction of the Registrar, and that proceedings be stayed until security given; and that costs of all parties be costs in the action.

Affidavits were read deposing, on behalf of defendant, that plaintiff was unable to pay costs, and on behalf of plaintiff, that he held property within the colony.

Byrnes, for plaintiff, opposed, and cited the *Federal Council (Foreign Judgments) Act*, No. 4, ss. 4–8; *Cain v. Cain*, 1 Q.L.J. 122; *Judicature Act*, O. 54, r. 2; *Redondo v. Chaytor*, 4 Q.B.D., 457.

Harding, J., referred to *Ebrard v. Gassier*, 28 Ch.D., 232.

Mansfield contended that the *Federal Council Act* only made execution in a foreign colony easier. *Byrnes* contended that it reduced it to a merely ministerial Act; colonies subject to the *Federal Council Acts* would not question or reserve the right to question one another's judgments.

HIS HONOR in dismissing the summons with costs, said as follows:—I think that since the passage of the *Federal Council Act*, No. 4, security for costs of action should not be required from a plaintiff resident in a colony, subject to that Act, and suing in another colony, also subject thereto,—at all events unless some other circumstances than the simple fact of non-residence, as in this case, are shown.

Solicitors for plaintiff: *Daly & Hellicar*, agents for *Jarvis & Turner*, Charters Towers.

Solicitors for defendant: *Bunton & Little.*

IN INSOLVENCY.

LILLEY, C.J. 17th and 29th June, 1887.

IN THE LIQUIDATION OF S. G. MELVIN.

Insolvency Act of 1874 (38 Vict., No. 5)—Proof of Debt—Secured Creditor—Valuation of Security.

This was an appeal by T. a creditor, from the decision of the trustee rejecting his proof of debt under the following circumstances:—T. had lent C., a third person, £3,000 on the security of certain allotments of land, and by way of collateral security, T. received from C. a promissory note of the insolvent and others in favor of C., and indorsed by him to T. The trustee having rejected the proof of debt on the ground that T. must have first valued his security.

Held, that, T. was entitled to prove against the insolvent and all the other parties, and also to realise his security, provided he did not receive altogether more than twenty shillings in the pound.

APPEAL from trustee's rejection of proof of debt for £3,350 of J. Taylor, a creditor, claiming *inter alia* on a joint promissory note by insolvent and others for £3,000 in favor of L. Cusack. Insolvent was a shareholder in a syndicate which had purchased land from Cusack and had given the promissory note. Cusack had mortgaged land to Taylor, and given the promissory note as col-

lateral security. He was now also insolvent. Melvin's trustee had rejected Taylor's proof on the ground that he must value the landed security first, and deduct from the amount of the promissory note.

Lilley moved on behalf of the creditor to admit the proof of debt. Taylor was an endorsee for value received; and was entitled to claim for the whole debt against Melvin's estate. He was not bound to recover on the collateral security of the land; it was impossible to deduct the liquidating debtor's interest in a joint estate of his and others. He cited *Robson's Bankruptcy*, 4th ed., p. 341; *English and American Bank v. Trenholm and Co.*, 4 Ch.App., 49, at 56; *Ex parte Adams*, 3 Mont. & Ayrton, 394. A dividend of £150 paid in respect of the same promissory note—paid by the estate of another of the makers—must of course be deducted from the £3,000.

Power, *Pain* with him, opposed on behalf of the trustee, and quoted *Walker v. Jones*, L.R., 1 P.C., 50.

The matter was adjourned to a later day, when the following further cases were referred to: *Ex parte Scofield*, 12 Ch.D., 337; *Ex parte Wildman*, 1 Atk., 109, and 2 Ves., 113; *Cooper v. Pepys*, idem, 106; *Ex parte Ryswicke*, 2 P. Wms., 89; *Ex parte Lefebvre*, 2 P. Wms., 407; *Ex parte Dickson*, 2 Mont. and Ayr., 99; *Ex parte Rushforth*, 10 Ves., 416; *Paley v. Field*, 12 Ves, 438; *Ex parte Todd*, in note to *Ex parte Royal Bank of Scotland*, 2 Rose, 197, at p. 202; *Ex parte Leers*, 6 Ves., 644; and *Ex parte Tayler*, 1 DeG. and J., 302, and 3 Jur. N.S., 753.

On the 8th July, His Honor delivered the following judgment:—

Mr. James Taylor, a creditor, appeals from the decision of the trustee rejecting his proof of debt for £3,000, part of the debt due. The £3,000 debt arose on a joint and several promissory note of S. G. Melvin and others in favour of L. Cusack, and indorsed by him to Taylor under the following circumstances: Taylor lent Cusack £3,000 on the security of certain allotments of land which were then mortgaged to him by Cusack, and by way of collateral security for that debt Taylor received from Cusack the promissory note abovementioned. Melvin's estate having gone into liquidation, Taylor applied through his agent, G. Harris, for proof of his debt without valuing the landed security which he held from Cusack for the £3,000. The trustee rejected his proof for that amount.

Mr. Power, *Mr. Pain* with him, for the trustee, contended that Taylor must value his security and give credit for it on proving his debt. *Mr. E. M. Lilley*, for Mr. Taylor, insisted that his client was entitled to prove for the full amount of £3,350, being the £3,000 and further sums, less a dividend of 1s. in the £ which he had received from one of the other parties, and without valuing the landed security. He cited *Robson's Law of Bankruptcy*, 4th edition, pp. 340–341, and the cases there mentioned. The rule as to proof by a secured creditor is that he must value his security, which, by reducing his debt, goes to swell the bulk of the estate divisible amongst the creditors. Where the security is over the estate of a third person—one in which the insolvent has no interest—it is clear the trustee cannot claim a deduction in respect of such property, which could in no way go to increase the amount divisible amongst the creditors of Melvin. It is claimed, however, that Melvin had an interest in the property jointly with Cusack and the other parties to the promissory note. Under such circumstances Taylor is entitled to prove without giving up the value of the security. The creditor is not bound to value his security unless the land was the property of the insolvent alone,—*Ex parte English and American Bank; In re Fraser, Trenholm and Co.*, 4 Ch. App., L.R., 56. Melvin, in fact, had no separate or distinct interest in the land which could be valued by the creditor (*Ex parte West Riding Union Banking Company; In re Turner*, 19 Ch.D., 112), and to force Taylor to value the whole security in favour of Melvin's estate would be to give the creditors of Melvin the benefit of the whole security without reference to the rights or interests of the other parties entitled to the land.

The rule which applies to the circumstances of this case is this:—Taylor is entitled to prove against Melvin and all the other parties, and also to realise his security, provided he does not altogether receive more than 20s. in the £. The trustees and solvent parties must adjust and settle their respective interests and liabilities amongst themselves. He has no responsibility on that account.

The proof must be admitted for the amount claimed, £3,350, less £150, the dividend already received from the other party, which, by admission, is to be deducted. Mr. Taylor must have his costs out of the estate of Melvin; the trustee also to have his costs out of the estate.

Solicitors for appellant creditor: *Macpherson, Miskin, and Feez.*

Solicitors for trustee: *Foxton and Cardew.*

IN CHAMBERS.

HARDING, J. 15th July, 1887.

In the matter of THE TRUSTEES AND INCAPACITATED PERSONS ACT OF 1867, AND *in the matter of* THE WILL OF JOSEPH MACALLISTER LEWTHWAITE, DECEASED.

Trustees and Incapacitated Persons Act of 1867 (31 Vic., No. 19) s. 6—Opinion of Court—Will—Construction—Power to apply part of fund to effect repairs to realty.

Wilson, on behalf of the trustees of the will, applied, under 31 Vic. No. 19, s. 6, for the opinion, advice, or direction of the judge.

The following are briefly the facts of the statement of the trustees:—Testator, after several specific bequests, had devised and bequeathed all his real and personal estate upon trust to the applicants to let the same or any part thereof remain in the same state of existence or investment as at his death, or in their discretion to sell all or part, and after payment of expenses to invest the residue as directed in the will, and to hold in trust for his child or children surviving; in the event of their decease before his wife he devised the same absolutely to her. Testator declared that the trustees should have uncontrolled discretion to apply moneys towards the education or maintenance of any child of his, being an infant; also to raise by sale or mortgage of real estate any part of the expectant share of any child, and to apply the same to his or her "advancement, preferment, or benefit," as they should think fit. There were further powers to lease, and "generally to manage" his estate. He appointed his wife testamentary guardian of his child or children. There was issue one child—a daughter—who was now an infant, unmarried. The trustees had allowed the widow to occupy the principal dwelling-house as part allowance for the maintenance of the infant. The said house was in a dilapidated and unhealthy condition and unfit for habitation, being infested with white ants, and of defective ventilation, and the roof leaky. The trustees had obtained reports from an architect and a builder to the effect that it would be necessary to rebuild part of the house, and that the cost thereof would be about £1,500. The trust estate under the will consisted of capital money to the amount of about £6,600, and the realty yet unsold was of the value of about £12,000; the annual income from both sources being about £730 per annum.

The questions submitted by the applicants were: (1) Whether the applicants were justified under the will in applying the sum of £1,500 for re-erection of the house; (2) If the judge answered the first question in the affirmative, out of what trust money or otherwise should the sum be paid; and (3) In the alternative, whether applicants would be using a proper discretion in selling part of the settled land in the estate under the *Settled Lands Act of 1886* for purpose of improvement; also (4) As to costs of the application.

Wilson cited *In re Pearson's Trusts*, 21 W.R., 401; *Lowther v. Bentinck*, L.R., 19 Eq., 166; *In re Norris*, W.N., 1883, 35 and 65; *In re Barrington's Settlements*, 1 J. & H., 142; *Bowes v. Strathmore*, 8 Jur., 92; *In re Larkin's Trust Estate*, W.N., 1872, 85; and *In re Tuck's Estate*, 4 W.N., 15.

The matter was then adjourned to the 21st July, for service on and appearance of the infant interested.

On the 21st, *Macpherson* appeared for the infant, and stated that she consented, and actually desired the work to be carried out.

His Honor gave the following answer: I think there is power for the trustees to act in the manner indicated, and that they may raise the monev or apply the funds in hand to that purpose. I have not sufficient data to fix £1,500 or any other sum as the proper amount to expend, but I think the trustees may apply a reasonable sum. The costs should come out of the *corpus* of the trust property.

Solicitors for applicants: *Wilson, Wilson & Brown.*

Solicitor for infant: *Macpherson (Macpherson, Miskin & Feez).*

AUGUST SITTING OF THE FULL COURT.

In the matter of WILLIAM HENRY SPENCER, A SOLICITOR.

Solicitor—Misconduct of.

In this case the solicitor had held a commission which was afterwards cancelled. The solicitor, knowing that his commission had been cancelled, took an affidavit verifying a bill of sale. An application having been made to strike him of the roll, and the solicitor not appearing, the order of the Court was that he be struck off the roll.

At the June sitting of the Court, *Lilley*, on behalf of the Queensland Law Association, obtained a rule *nisi*, returnable at the next sittings, calling upon the solicitor to show cause why he should not be struck off the roll of solicitors of the Court, for misconduct.

The facts were, simply, that up to 21st July, 1886, the solicitor, who was practising his profession at Beenleigh, had been a Commissioner for Affidavits of the Court. On that date, not having replied to a circular issued by direction of The Chief Justice for purposes of the revision of the list of commissioners, he received notice that his name had been struck off the list. Afterwards, early in October, he saw the Registrar of the Court and made a verbal explanation of his failure to reply to the circular, to the effect that he had been absent from his office, travelling about the district, and had not received the circular until it was too late to answer it. He enquired, and was informed by the Registrar, as to the method to pursue to be reinstated. At that interview he handed in his commission which was subsequently cancelled. Besides the verbal explanation, the Registrar, on 4th October, wrote to the solicitor to the same effect. He received no reply. On 6th April, 1887, a person named Cox took an affidavit, verifying a bill of sale, to the solicitor, who administered the oath as a Commissioner for Affidavits, signed the jurat, and demanded and took a fee of £1 1s.

The matter being now called on,

Lilley, for the Law Association, moved the rule absolute.

There was no appearance on behalf of the solicitor. *Lilley* thereupon read the affidavit of service of the rule *nisi* upon him.

Lilley, C.J., in giving the judgment of the Court, said:—In this case the solicitor is still on the roll, and had held a commission authorising him to take affidavits. Application was made to him to take one verifying a bill of sale. He took it; and afterwards it was discovered that his commission was cancelled. He was himself aware at the time of the cancellation of his commission; so that, in taking the affidavit, he assumed a power which he had not. He does not appear now. Therefore the only course open to us is to strike him off the roll; and the order of the Court is that he be struck off the roll of solicitors of this Court, and that he pay the costs of this proceeding.

Solicitor for Law Association: *Osborne.*

2nd August, 1887.

WARNER *v.* FRANCIS AND KESTERTON.

Divisional Boards Act of 1879 (43 Vic. No.17) sec. 42—Returning Officer—Misfeasance of.

In this case the returning officer, having issued one set of ballot papers for a particular voter and despatched them, issued a second set before the first set could have possibly reached him at his residence.

Held, that, such conduct amounted to a misfeasance under sec. 42 of the *Divisional Boards Act of 1879*.

Held also, that, magistrates can, on a complaint for such misfeasance, order the divisional clerk to produce the set of ballot papers used by the voter under sec. 83 of the *Justices Act of 1886*, if they require them.

APPLICATION to make absolute an order, granted by His Honor The Chief Justice at Chambers, under s. 29 of *The Justices Act of 1886*, to quash a conviction made against Robert Warner by Christopher Francis, P.M., at Cunnamulla, on the complaint of V. T. Kesterton, for a misfeasance as returning officer under s. 42 of *The Divisional Boards Act of 1879*. The applicant was fined £25 for a breach of the provisions of s. 30 of *The Divisional Boards Act*.

The grounds on which the order *nisi* was made were:—that (1) there was an improper admission of evidence, and (2) the conviction was against the weight of evidence.

The facts were as follows:—As to the first ground—On the 18th January, the applicant, as returning officer for the Divisional Board of the Paroo, at Cunnamulla, issued and posted ballot papers, for the election of the Board in February, to a ratepayer named Müller, residing at Eulo, about 50 miles from Cunnamulla; on the same day Müller came to Cunnamulla, and applicant gave him duplicate ballot papers, without receiving the required declaration under the 42nd section of *The Divisional Boards Act*. The postage at Cunnamulla, and delivery at Eulo of an envelope addressed to Müller and endorsed "ballot papers;" the subsequent destruction of the first set issued; and the applicant's refusal in another instance to issue duplicate ballot papers before three o'clock on the following day were proved by affidavit.

As to the second ground, the Police Magistrate had ordered the production of the ballot papers, which were sealed up in the custody of the Clerk to the Divisional Board. They had been produced, and the use by Müller at the election of the second set of papers issued to him was thereby proved.

Mansfield appeared for the applicant; *Power*, and *Real* with him, for the respondent, Kesterton.

Mansfield moved the order absolute.

Power showed cause. There was power to order the production and opening of the sealed ballot papers by the Police Magistrate, under s. 83 of *The Justices Act* and s. 39 of *The Divisional Boards Act*. The sealing up of papers under s. 34 of *The Divisional Boards Act* is for safe keeping; s. 65 of *The Elections Act of 1874* is a similar provision. He also cited *Regina v. Beattie*, 2 Q.L.J., at 111. As to the conviction being against the weight of evidence, there was sufficient evidence for the Bench to convict; the returning officer might have been called, and was not. The order should be discharged.

Real followed:—There was evidence of issue and postage of the first set of ballot papers according to provisions of s. 26 of *The Divisional Boards Act*; and that they were in an envelope, and addressed to Müller and endorsed to Müller, that they arrived at Eulo, and was destroyed by Müller's wife. There was evidence also the second set was delivered on the same day that the others were posted, and some days before the polling day, and without a declaration being made as required by s. 30 of *The Divisional Boards Act*. He referred also to ss. 34, 39 and 42 of *The Divisional Boards Act*, and s. 83 of *The Justices Act*.

Mansfield in reply:—This was not a case between parties contesting election; but against returning officer for issuing the duplicate ballot papers contrary to the statute. There was no need for production of the papers, the case might have been proved without them. *Regina v. Beardsell*, 1 Q.B.D., 452. The clerk to the Divisional Board was not bound to produce them; the returning officer was the only one bound to do so. There was not evidence, that the first set was issued, sufficient to satisfy a reasonable man.

LILLEY, C.J., delivered judgment, as follows:—By section 42 of *The Divisional Boards Act*, if the chairman of any divisional board, or any person duly appointed to act as returning officer, "shall be guilty of any wilful misfeasance or wilful or negligent act of commission or omission contrary to any of the provisions of this Act," he is liable to a penalty to be recovered in a summary way before two justices. The allegation in this case was that the returning officer, having issued one set of ballot papers for a particular voter and despatched them, on the very same day, before they could possibly have reached the voter at his residence, issued a second set of voting papers. The charge is that he is guilty of wilful misfeasance under these circumstances. The issue of a second set of voting papers is authorised by the statute under particular circumstances which do not appear to have arisen in this case. By section 30—

> At any time before three o'clock in the afternoon on the day of closing the election it shall be lawful for the returning officer to issue a second or duplicate ballot paper to any qualified voter whose original ballot paper shall have miscarried Provided that the voter shall first make a declaration before the returning officer that he has not received the original ballot paper and has not already voted at the election.

There was no evidence in this case that the original ballot papers had miscarried; in fact, the two sets seem to have been issued almost simultaneously; and he did this, on the 18th January, several clear days before the closing of the election. There are here two clear cases of misfeasance: first, the ballot papers were issued several days before the closing of the election, and, second, there was no evidence that the first set had miscarried. In fact they could not have done so, because there was no time for them to have reached the voter by post. There was sufficient evidence that both sets were in existence: first, there is the letter despatched, with the ballot papers enclosed, by the clerk; then, the evidence of the envelope, marked "voting ballot papers," at the post office where the man resided, or to which they had been despatched; also, that certain voting papers were received from his wife and destroyed. For the second set, there is evidence that they were actually used by the voter Müller. The voter appears to have been at headquarters; he was at the place where the voting was afterwards to be; at all events he was met by the returning officer. It was known, or at any rate the probability was, that the first set despatched through the post would not reach him. Then a second set was issued. We have then two sets in existence. That is clearly a violation of the statute, because there is, first, no miscarriage of the original voting papers; and, second, the day for closing the election had not arrived. There was a third piece of conduct which was a misfeasance under the statute; for the returning officer had entirely disregarded the proviso of the 30th section, which is that the voter shall first make a declaration before the returning officer that he has not received the original ballot papers and has not already voted at the election. So here is a third case of misfeasance:—The second set were issued, although the returning officer had no evidence before him that the first set had miscarried.

The returning officer was guilty of misfeasance. Then the question is:—Was there a misreception of evidence against him by the admission of the second set of voting papers, which the voter had used, from the hands of the clerk of the divisional board? The voting under this statute is said to be by ballot. In some respects it has not the secrecy of voting by ballot; that seems to be dispensed with. For instance, the voter may sign his papers in the presence of another voter, or of a justice of the peace. That is, clearly, not voting by ballot in the sense of the real secrecy of the ballot. The voting papers here were in the hands of the clerk, and the magistrates, requiring them, to prove that the duplicate set had been used, ordered the clerk of the board to produce them. Even if they had been unlawfully in his custody, still they could be produced in the case. Even if they had been stolen by him, unless he objected for his own protection, he would have to produce them if necessary to proving an offence of a penal nature under this section against the returning officer. If

the returning officer had had actual possession of the papers, he might have refused to produce them, because they would criminate him. It is only disclosure of the vote that is forbidden; but of course, though production of a voting paper would disclose the vote, it may be taken that the statute forbids their production except under the circumstances provided by the 39th section. That forbids

any returning officer or any scrutineer or clerk in discharge of his duties under the Act at or concerning any election by word or act or any other means whatsoever directly or indirectly

to

divulge or aid in divulging or discovering

how any person has voted,

save in answer to some question which he is legally bound to answer.

Well, now, the clerk was lawfully in possession of these papers as custodian probably on behalf of the returning officer. There is no suggestion that he had stolen them, or become possessed of them, by any trespass. Then, was he legally bound to answer a question in respect of their custody; in other words, was he bound to produce them? It seems to us that it would be straining the language of the Act, if we were to hold that in a penal proceeding the person in lawful possession or custody of documents,—the clerk,—where that penal proceeding is not against himself, but another person, is not bound to produce the documents. Had the proceedings been against the clerk, he would have had the same protection that I said the returning officer would have, if they were in his custody—that a man is not bound to produce what would criminate himself. Here the clerk was asked to produce matter that would criminate the returning officer. Clearly he would not be protected from producing any such instrument in his possession. Section 34 was referred to; but that in no way forbids the returning officer producing them. It deals only with safe custody of papers—

The returning officer shall forthwith after the declaration as aforesaid seal up the ballot papers in a packet and endorse it with a description of the contents and sign with his name such endorsement and shall safely keep the same for six months.

That does not interfere with the production of them, if needed for the purposes of justice, in the meantime. The magistrates, then, acting upon their authority under section 83 of *The Justices Act*, having this complaint before them, and requiring evidence of the issue of the double set of papers, consider it essential that they should have before them the ballot papers which had been actually used by the voter, and, by force of *The Justices Act*, they, exercising a power which this Court has upon a *subpœna duces tecum*, order the clerk to produce the papers. He does so. It seems to me that they had authority to make that order; and that the witness was bound to produce them. That being so, there would be no misreception of evidence. On the point of the judgment of the justices being against the weight of evidence, if the justices had sufficient evidence from which a reasonable inference might be made against the accused,—sufficient to support a conviction—it is no objection or answer to say that they might have had better evidence. Upon both points, I think, therefore, that the rule *nisi* should be dismissed.

HARDING, J.: I have nothing to add. For the reasons given by the learned Chief Justice, I think the order for the rule *nisi* should be dismissed.

MEIN, J., concurred.

Solicitors for applicant: *Daly and Hellicar.*

Solicitor for respondent: *Drake*, agent for *Kesterton*, Cunnamulla.

HARDGRAVE *v.* HUME.

Crown Lands Alienation Act of 1868 (31 Vic. No. 46) sec. 98—Volunteer Land Order—Suburban Land—Regulations 1, 3.

The plaintiff, a volunteer, applied upon a certificate issued under the provisions of *The Crown Lands Alienation Act of 1868*, sec. 96, and regulations, to select unsold suburban lands which had been offered at auction more than twelve months after the date of the certificate, but within the twelve months immediately preceding the date of his application. The Land Commissioner refused to approve of the application. *Held*, that the plaintiff was entitled to apply to select these lands,

but that under regulation 3 the approval of the commissioner and confirmation of the minister were necessary conditions precedent to the creation of a statutory contract or duty enforceable against the Crown. *Held*, further, that such approval and confirmation were acts of a judicial nature, and that if approval or confirmation were refused the court had no power to review that determination.

SPECIAL case stated by consent, under O. 34, for the opinion of the Court on questions of law arising on a claim, under sec. 98 of *The Crown Lands Alienation Act of 1868*, for a free grant in fee simple from the Crown of specific suburban lands.

Plaintiff was the holder of a volunteer land order received for efficient service in the Volunteer Force of Queensland; and defendant was Chief Commissioner of Crown Lands, and the nominal defendant on behalf of the Crown.

The special case was stated as follows:—

Special case stated by consent for the opinion of the Court pursuant to the Rules of the Supreme Court, Order XXXIV.

1. This action was commenced on the 19th day of May, 1887, by a Writ of Summons whereby the plaintiff claimed:—

(1.) A declaration that he is entitled to have his application under *The Crown Lands Alienation Act of 1868*, dated the 29th day of January, 1886, to select allotments 3, 4, and 5, of section 5, in the County of Stanley, and Parish of Enoggera, confirmed or approved by the Secretary for Public Lands.

(2.) Specific performance of the statutory contract or right under *The Crown Lands Alienation Act of 1868*.

(3.) That deeds of grant may be issued to him and his heirs for an estate in fee simple, in possession in the said lands.

(4.) A mandamus.

And the parties have concurred in stating the questions of law arising herein in the following case, for the opinion of the Court.

2. The plaintiff having been a member of the Volunteer Force of Queensland, and not being on the paid staff thereof, nor serving for regular pay therein, and having served as an efficient member of such force for a continuous period of five years, in conformity with the regulations in that behalf duly approved by the Governor, and laid before both Houses of Parliament, and dated the 14th day of July, 1870, produced to the Colonial Secretary of the said colony a certificate that he had served as an efficient member of the said Volunteer Force for a continuous period of five years from the passing of *The Crown Lands Alienation Act of 1868*.

3. Regulation 1, of the aforesaid regulations of 14th July, 1870, was and is in the words and figures following, that is to say:—

"Every officer non-commissioned officer or member of "the Volunteer Force of Queensland not being on "the paid staff or serving for regular pay who "shall produce to the Colonial Secretary a certifi- "cate that he has served as an efficient member of "such force for a continuous period of five years "from the passing of *The Crown Lands Aliena- "tion Act of 1868* or that he has previously served "for an equivalent period thereby acquiring the "right to a free grant of land under section 98 of "the Act aforesaid shall be entitled to receive a "certificate in form A to select ten acres of any "suburban land which has been offered at auction "during the preceding twelve months and not "sold or fifty acres of any country land open to "selection under the Act aforesaid such privilege "to be confined to one selection."

4. On the 27th September, 1880, the plaintiff under and by virtue of the provisions of the said regulations dated the 14th of July, 1870, as aforesaid, received a certificate purporting to be in form A to the said regulations, and numbered 606.

5. In pursuance of a proclamation under the hand and seal of His Excellency, the Governor of the said colony, dated the 16th December, 1885, it was notified and proclaimed that suburban allotments 3, 4, and 5, of section 5, in the County of Stanley, and Parish of Enoggera, and comprising in the aggregate an area of eleven acres, two roods, and twenty-eight perches, would be offered for sale by public auction, at Martin's Auction Rooms, Brisbane, at the hour of eleven o'clock, on the 25th day of January, 1886.

6. The said allotments of land were so offered for sale by public auction on the day and at the place aforesaid, in pursuance of the said proclamation, and were not nor were any of them sold.

7. By regulation No. 2, of the said regulations of the 14th July, 1870, it is provided that—

"Any such officer non-commissioned officer or member "as aforesaid wishing to select land by virtue of "such order shall apply for the same to any land "agent within the settled districts of the colony "in the form annexed."

8. On the 29th of January, 1886, the plaintiff applied to the Land Agent for the District of Brisbane, to select the said allotments of land which comprised an area of one acre, two roods, and twenty-eight perches, in excess of the area of ten acres claimed by him under the rights conferred upon him by *The Crown Lands Alienation Act of 1868* aforesaid, and the said regulations dated 14th day of July, 1870.

9. By regulation No. 3, of the said regulations of 14th July, 1870, it is provided that—

"Such applications shall when lodged be dealt with in "the same manner as lands applied for under the "leasing clauses of the Act so far as relates to the

"payment of survey fees approved by Land Com-
"missioner at court sitting and confirmation by
"Minister for Lands after which a free grant shall
"issue in favor of the applicant.

10. By regulation under the said Act dated the 2nd September, 1870, it is provided that—

"In the event of any member of the Volunteer Force
"applying under the regulations of the 14th July,
"1870, for one or more suburban allotments the
"area of which exceeds ten acres the boundaries
"of the same may be amended with the concur-
"rence of the Secretary for Lands so as to reduce
"the area to the maximum allowed to be selected
"all expenses of survey being borne by the appli-
"cant but should the excess not exceed two acres
"the applicant will be required to purchase same
"at the upset price per acre for which the land
"was offered for sale when a deed of grant of the
"whole area as surveyed will be issued to him."

11. On the 29th January, aforesaid, and at the time of applying to select the said allotments, the plaintiff in pursuance of the regulation in that behalf duly made on the 2nd day of September, 1870, paid to the said land agent in respect of the said excess of area of one acre, two roods, and twenty-eight perches, the sum of one hundred and five pounds, two shillings, which was the upset price of the said excess mentioned in the said proclamation of the 16th December, 1885.

12. By regulation under the said Act, dated the 12th day of August, 1870, it is provided that—

"Applicants for grants under the regulations of the
"14th July 1870 shall be exempted from the
"payment of survey fees as prescribed in the
"third section of the said regulations but in cases
"where the boundaries of surveyed lands are
"amended so as to reduce the area to the maxi-
"mum allowed to be selected the cost of survey
"must be borne by the applicant."

13. The said application of the plaintiff to select the said allotments 3, 4, and 5, of section 5, has not been approved by the Commissioner of Crown Lands, nor confirmed or approved by the Minister for Lands.

14. The Government of the said Colony although frequently requested by the plaintiff so to do, has refused and still refuses to issue, or cause to be issued to the plaintiff, deeds of grant for the said allotments of land, or any or either of them, and the plaintiff has not received deeds of grant for any or either of them

The questions for the opinion of the Court are:—

(1.) Whether or not by virtue of section 98 of the said Act, and the said regulations duly made thereunder, the plaintiff, under the circumstances hereinbefore stated, was on the said 29th January, 1886, entitled to select and have issued to him a free grant of the suburban land consisting of allotments 3, 4, and 5, of section 5, aforesaid?

(2.) Whether or not the plaintiff is entitled to have his said application under *The Crown Lands Alienation Act of 1868*, dated the 29th day of January, 1886, to select the said allotments 3, 4, and 5, of section 5, approved by the Commissioner of Crown Lands, and confirmed and approved by the Minister for Lands?

(3.) Whether or not the plaintiff is entitled to a deed or deeds of grant for the aforesaid land?

If the Court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff, with costs of suit.

If the Court shall be of opinion in the negative, then judgment shall be entered up for the defendant, with costs of suit.

Chubb, *Q.C.*, and *Lilley* with him, appeared for the plaintiff; *Rutledge*, *A.G.*, *Real* and *Shand* with him, for the defendant.

Chubb, *Q.C.*, opened, and cited *The Crown Lands Alienation Act of 1868*, s. 98, and the regulations thereunder published in the *Government Gazette* on the 14th July, 12th August, and 2nd September, 1870. There was by the Act and regulations a contract; and the plaintiff had fulfilled the conditions required of him. The Act did not limit his right of selection to any part of the colony, or to land which had been surveyed or offered for sale. The limitation as to time within which available land should have been offered for sale, as contended for by the Crown, was *ultra vires*. If otherwise, and none had been offered within the preceding twelve months, the certificate would die as soon as issued. Assuming the regulations were good, plaintiff had complied with their provisions. The Act empowered the Governor in Council to make regulations as to the mode of application for land. They were to regulate a purely ministerial duty; and should carry out and not alter the intention of Parliament. The Act intended that a volunteer should acquire ten acres of suburban land. The commissioner refused this application because he thought it too valuable for such a grant.

Lilley followed. Regulation No. 3 of 14th July, was *ultra vires*. The Act said the volunteer was entitled to the grant of land after having fulfilled certain conditions; but regulation 3 made the commissioner's approval necessary. That was *ultra vires*, and the plaintiff was therefore entitled to the land which he had selected, after fulfil-

ment of all the other conditions. Otherwise a man might be occupied going from one piece of land to another until he could obtain the commissioner's approval. Under section 47 of the Act, and regulation No. 3 of the 14th July, the commissioner was bound to grant plaintiff's application, as he was the only applicant; the land was by the section to be "at once allotted." Referred also to sections 5, 6, 51, and 98.

Rutledge, A.G., for the defendant. The grants were subject to such regulations as the Governor in Council should make from time to time; and the regulations which had been made were more in favour of the volunteer than of the Crown. The Act left it to the option of the Government whether the applicant should have a suburban or country selection, but the regulations gave him the choice. Then, as to suburban lands, it was necessary to provide how that option should be exercised, and that was done by regulation 1 of the 14th July. Regulation 3 could not be regarded as *ultra vires*. The commissioner and minister were not recording clerks; they had to consider and approve of the selection made.

Real followed. The Act said a volunteer might select ten acres of land; and the regulations said how he might do so. After getting his commanding officer's certificate, he could when he liked go to the Colonial Secretary and obtain from him another certificate entitling him to select.

Shand followed.

Chubb, Q.C., replied.

C. A. V.

On Thursday, 4th August, the following judgments were delivered:—

LILLEY, C.J.: In this case the plaintiff sues Mr. Hume, a nominal defendant on behalf of the Government of the Colony, for the specific performance of an alleged statutory contract or right under the *Crown Lands Alienation Act of 1868*. He also claims a deed of grant in fee of certain specific lands; and, lastly, he asks for a *mandamus* to give effect to that claim. The parties have settled a special case, and our opinion is requested; firstly, whether under section 98 of the Act of 1868 plaintiff is entitled to select and have issued to him a free grant of suburban lands consisting of allotments 3, 4 and 5 of section 5 in the County of Stanley and Parish of Enoggera; secondly, whether or not he is entitled to have his application under the Act of 1868 to select those allotments approved by the Commissioner of Crown Lands, and confirmed and approved by the Minister for Lands; and, thirdly, whether or not he is entitled to a deed or deeds of grant for the aforesaid land. The plaintiff can only have the relief he claims either in respect of the specific duty on the part of the Commissioner and Minister for Lands, or on the footing of a statutory right or contract agreed upon between the parties.

The facts, of course, are very simple. The plaintiff was a volunteer who served five years in the force in the colony; became efficient, and entitled in respect of that service and efficiency to a certificate from his commanding officer, which certificate he got. That certificate he presented to the Minister for Lands, who gave him a certificate under one of the land regulations issued on the authority of *The Crown Lands Alienation Act of 1868*, so that, in fact, he had entitled himself to ask for a grant of land. His right, if any, arose, as I have said, under *The Crown Lands Alienation Act of 1868*, section 98, which is this:—

> Every officer non-commissioned officer and member of the volunteer force of Queensland not being on the paid staff of or serving for regular pay in the said force—

this was a private soldier in the force—

> shall be entitled after having served as an efficient member of such force for a continuous period of five years from the passing of this Act to receive from the Government in consideration of his efficient services a free grant of ten acres of suburban land or fifty acres of country land subject to such regulations and conditions as may from time to time be approved of by the Government and laid before both houses of Parliament and the certificate of the officer commanding the volunteer force shall be sufficient evidence that any officer non-commissioned officer or volunteer has served as an efficient volunteer the prescribed term of five year.

Then there is a proviso which does not apply to this case. Now, upon the construction of that section, it seems clear that the volunteer in this

case would be entitled to a grant—a free grant, absolutely discharged of any payment whatever of purchase money, fees, or anything else—of ten acres of suburban land or of fifty acres of country land; and if the Government failed to make a regulation under this section, which they have not done, or if they refused to give him any grant of ten acres of suburban or fifty acres of country land, then it seems clear that he would have a right of action against them, either to enforce a grant of land or to have consequential damages on their refusal to give him that land. But the right claimed here, looking at it as a matter of contract, is a grant of specific land. I do not understand that the Crown make any demur to making a grant of ten acres of suburban or fifty acres of country land. But what they do demur to in respect of plaintiff's application is that they shall give him this particular portion of land which he has selected. Now, is there any duty on the part of the officers of the Crown which we might enforce by *mandamus*, requiring them to grant this particular portion of land? It is clear to my mind that, if it is a statutory duty to grant this particular portion of land, it could be enforced by *mandamus*. But here, looking at the construction of the statute, which for the first time introduced the machinery of land courts into the colony, and looking not only at the whole machinery but at the particular sections 5, 6, and 51, it seems to me that a court was established, and that the officers of the Crown, with respect to these sections, were discharging judicial functions and that there is no duty which we could enforce by *mandamus*.

Then comes the question, whether, on the basis of contract, the volunteer is entitled to have this specific portion of land? I emphasize that, because he is entitled to ten acres of suburban or fifty acres of country lands; but he claims the right to select a specific portion, and unless he has succeeded in satisfying the Court that he is entitled to the specific portion selected by himself, in spite of what the Crown says on the subject, he cannot have the remedy claimed in this action. Now the Crown has made regulations; and the first question which arises is, whether the regulation of the 14th July, 1870, is valid by force of the statute—whether it is *intra vires* or *ultra vires?* If it is *ultra vires*—not supported by the section—the Governor had no power to make it, and could neither give a right nor circumscribe a right under it. If it is *intra vires*, the volunteer and everybody else are bound by it. There is a question of construction on the first portion of the section which I will deal with afterwards; in the view which I take of this case it is scarcely necessary to be noticed. I think the whole of this regulation of the 14th July is valid by force of the statute—except that portion which relates to the charge of survey fees to a volunteer or party applying, and which was *ultra vires* because the grantee was entitled a free grant, but which was altered, because, I suppose, the Government discovered it was beyond their power, and discharged the grant from that condition. So the volunteer was entitled by this regulation to a free grant of whatever land he was entitled to have. That is the important matter. Well, the whole of this regulation except that part relating to survey fees, which is now no part of it, is *intra vires*—valid by force of the Act—and whatever right the volunteer took under section 98 is governed by this regulation, which is one of the regulations and conditions approved of by the Governor in Council, and laid before the Houses of Parliament in pursuance of this statute.

The facts show that the volunteer himself has done all that he was required to do to entitle him to a grant of land. Nothing is alleged against him; he is entitled to ten acres of suburban or fifty acres of country land. He has made an attempt—at all events he applied to select ten specific acres of suburban land. There is a little extra, which I discharge from the consideration of this case, because there is a regulation entitling him to pay for a certain excess. I take it as an application for ten specific acres. Now paragraph No. 3 of the regulation imposes a condition:—

Such application shall, when lodged, be dealt with in the

same manner as lands applied for under the leasing clauses of the Act, so far as relates to the payment of survey fees, approval of Land Commissioner at court sitting, and confirmation by Minister for Lands; after which a free grant shall issue in favor of the applicant.

Now I have said that I think it was a judicial duty. In the first place the regulation says the duty shall be discharged in court. Then it shall be an approval which, I take it, means that there shall be something before the person exercising these judicial functions upon which he shall make a selection, and approval, if there are two sets of circumstances—or anything to be considered. I think the word "approved" implies that there is clearly and fully an exercise of judicial authority. If a man is to approve, he must have his choice between two things; he must have his choice between these two things probably—is it in the public interest desirable that this particular piece of land should be applied for, or not? The Government might say, we want it for public buildings; it is in the surveyed line of a proposed railway; we intend to grant it to a municipality for a library or for other purposes. In the possible contingency of the Government wanting money, it might be of considerable importance that this particular piece of land should be brought into the market; it might be of immense value; it might be by the river side, and very saleable for wharfage purposes at an enormous value; it might be on a choice site where the wealthy members of the community might wish to erect villas; there might be many reasons why it might be required of the Commissioner as a public duty, without question of partiality, to refuse this particular piece of land. It is a judicial matter; and, if we refer to sections 5 and 6, it becomes more apparent that these are judicial duties. Section 5 says—

All questions shall be decided by the Commissioner who shall give his decision in open court subject to confirmation by the Governor in Council.

Well, now the regulation itself has provided that he shall deal with this matter "at court sitting." Then again section 6 says—

A book to be called the "Application Book" shall be kept open during office hours and at all land offices in which the name of every person desiring to make any application to the Commissioner shall be written in order by himself or any person duly authorised in his behalf and such applicant shall lodge a written statement of the subject of his application and the Commissioner shall consider and determine all applications in the order in which they shall appear in the application book.

So that, all through, he has to consider and determine, and to hear applications made for lands under the statute. Well, if we come to section 51—

When any land selected as aforesaid—

under clauses, relating to the leasing of lands, which are made applicable by regulation to cases of this kind—

shall have been surveyed and approved by the Minister for Lands the Governor shall issue to the selector a lease of such land subject to the conditions and provisions hereinafter contained.

Now they must be approved; again a hearing, an approval, a judicial selection, and a determination as to the fitness of a particular grant. It seems to me that by the true construction, regarding the matter in the light of a duty under the statute, it is a judicial duty; and we have no power to force any officer of the Crown to decide a thing in a particular way which may meet our view, but which may be repugnant to his sense of duty.

We were pressed at the Bar on behalf of the plaintiff with the 47th section. At first sight it appeared favourable to his case—

Applications for the conditional purchase of agricultural land shall be recorded by the land agent and the land at once allotted subject to such general regulations concerning survey of roads or the prevention of a monopoly of permanent water or otherwise as may be made pursuant to the provisions of this Act.

Where there is one selector, the land agent is to at once allot the land. But this section is overridden and governed by all the other sections; and is susceptible of easy explanation. To allot may mean to give absolutely, but it may mean to set aside, subject to further consideration. It means to my mind simply this:—A drawing, and "This is yours, if all other conditions are fitting to the final allotment." Although the land agent allots this land, he is subordinate. It means simply—"I put aside these acres for the consideration and

approval of the Commissioner and Minister; for them, if they see fit, to approve and confirm; if not, that allotment goes for nothing,"—because the applicant has failed to secure the subsequent conditions entitling him to a grant in fee. I think I have exhausted all the matter so far as it can be regarded in the light of a matter of duty of a public officer. When it is clear and specific under the statute that nothing more had to be done, and no approval to be given, there would be no judicial function to exercise, and it would be a clear and specific statutory duty, which the court would have power to enforce.

As a matter of contract, there must be two parties to a contract. If we regard it as that, why then, the volunteer had undoubtedly served his time. The statute, although that would not aid the interpretation, was, I know, as I said yesterday, intended to encourage a class of men, who volunteered in the service of the country, and spent five years in rendering themselves good soldiers, and whose residence in the country would be of sensible value to the community. It was intended to retain these men amongst us, as a precious portion of the community, and the Legislature said to them, "You shall have ten acres of suburban land or fifty acres of country land."

With regard to the increase of value in land, if we look back at the section, there is no doubt that that was a right, and was given to secure this section of our population. I am bound to construe the statute by the language actually employed and by the meaning of that language. Whilst it gives a grant of ten acres, or fifty, as the case may be, it fixes no locality, and does not give the volunteer an absolute right to fix the locality himself. The colony is wide, and men would reside in different parts of the colony; and it would not be desirable to say it should be in the particular part of the colony where the volunteer had served. It would be better to leave it free. A man might have served in the Brisbane district, and become an efficient and valuable soldier; but he may have volunteered to transfer his service from the southern to the northern districts of the colony, and it would be well that his homestead, the centre of his life, so to speak, should be in the particular district for the defence of which he would be willing to volunteer. Therefore it is left free, and the Government might certainly, when he asked for his ten acres, or fifty acres, say "You shall have them; but there are reasons why we can only give them to you at Maryborough, instead of here." It would not be reasonable; it would be better to give them where he had spent those five years. They might not do so, or they might interpret it in the most favourable way to the volunteer. They might think it better to settle him on the ground he is most familiar with; from a military point of view, it would be wiser, because he would know the ground he should fight over. But, as a matter of contract, they would satisfy their part, he having done all that was required of him, by granting him ten acres in any suburb, or fifty acres in any country lands in the colony.

The regulation, if this is to be regarded as a matter of statutory contract, points out who is to be the party to that contract on behalf of the Government. Now, the volunteer, first of all, gets a certificate from his commanding officer, and then another from the Colonial Secretary, which would entitle him to select. The Crown has gone so far as to give him an inchoate right, a somewhat more extensive right than the wide language of the section would imply—a right to fix the locality, if he can get the approval of the Land Commissioner and of the Minister for Lands. They seem to be necessary parties to this contract. Can we compel them? That would be contrary to our law, as far as I can see. A contract must be a voluntary act. In this case it must be a judicial act. The minds of the Commissioner and of the Minister must be made up, and must agree with the volunteer's, that that is a fitting place for the selection. It has been pointed out by my brothers Harding and Mein, and at the Bar too, that a man might get a certificate, and, instead of making his selection, and settling down, that he might hold it over for five, or ten, or even twenty years, and

wait until some suburban land of exceptional value had been put up and not sold; and then go and say, "This was put up and passed the hammer; nobody bid for it;" and might use his land order, not for purposes of settlement, but for speculation. That would be certainly not within the meaning of the statute; certainly not within the object of the statute. Still, if he can compel the Commissioner and the Minister for Lands to approve of his selection, notwithstanding the fact that the land which he obtains is of exceptional value, he would be in the right. But that right depends upon his power to compel the approval of the Commissioner and the confirmation of the Minister. If the Commissioner withhold his approval, or the Minister his confirmation, then, I think, there is no contract. Here it appears to be agreed that each has been asked and has refused. That being so, there is no contract. In my judgment all the questions must be answered in the negative.

With regard to the particular question of construction, I do not think I need go very much into detail. It is not of importance now, except as a matter of opinion. It seems to me, if a man gets a certificate in form A, he is entitled to select any portion of suburban land offered for sale, and not sold, during the twelve months preceding the receipt of his certificate. The real question is, whether the Commissioner and Minister can be forced to make a contract. There is no contract here, and he has no right to sue as upon a statutory contract. I do not know whether the Crown would ask for costs?

Rutledge, A.G.: There is an agreement as to costs in the special case.

HARDING, J.: The question for decision here arises upon the 98th section of *The Crown Lands Alienation Act of 1868*, and certain regulations that have been made thereunder. It is—What are the rights of a volunteer who has obtained a certificate of five years' continuous service? So far as section 98 goes, the words are of the largest. Such a volunteer was to—

> receive from the Government in consideration of his efficient services a free grant of ten acres of suburban land or fifty acres of country land, subject to such regulations and conditions as may from time to time be approved of by the Governor and laid before both Houses of Parliament.

Under that, if there was nothing more, the volunteer holding a certificate is in my opinion entitled to receive ten acres—or fifty—undefined. The first question is—Are these ten acres to be selected by the volunteer, unaffected by any assent on the part of the Government? If that question be answered in the affirmative, I think numerous absurdities would arise. It would place such power in the hands of the holder of a certificate that one man could frustrate the administration of the lands of the colony;—any object that the Government had in view,—for example, going to proclaim a new township in such and such a country district; while a combination of two or three or half a dozen men would absolutely stop that administration. Before doing that, they must survey and lay it out. All the volunteer would have to do would be to go down on hearing that a site was being surveyed, put his finger down, and say, "That fifty acres will do for me." If the selection of the ten or fifty acres were in the hands of one side only, the Government would be so hampered that the administration of the Lands Department would be stopped for all practical purposes. Now, when one construction of a document leads to an absurd result, and there is yet another construction open, the Court invariably takes that construction which cannot lead to an absurdity. It cannot lead to an absurdity to say, the volunteer is to have ten acres of suburban or fifty acres of country lands; but that they are to be selected with the approval of both parties. In the ordinary case, if a man contracts to sell an estate for five hundred sovereigns, he cannot choose a particular five hundred sovereigns, but must take the five hundred the purchaser chooses to give him. They are legal tender, and he must accept them. Here he is entitled to ten, or fifty acres. He must take such ten, or fifty acres, as the Government of the Colony are prepared to allow him to take. That being the construction of this section, then it was

to be subject to such regulations and conditions as from time to time might be approved of, and conditions were made, markedly on the 14th July, 1870, and afterwards, varying this section. These regulations cut down, localised, so to speak, the rights under the section for the benefit of the volunteer. In the first place, instead of his only having his commander's certificate under which he was to take land wherever it could be given him, he was to get a certificate from the Colonial Secretary. The volunteer—

shall be entitled to receive a certificate in the form A, to select ten acres of any suburban land which has been offered at auction during the preceding twelve months, and not sold; or fifty acres of any country land open to selection under the Act aforesaid; such privilege to be confined to one selection.

So that, it was there pointed out, if he got that certificate, there were then certain specific lands which, if he applied for them, having taken the proper procedure, might be granted by the Government, but if he applied for any others than those he would be refused. Now, what is the proper procedure under the Act? First of all, he must apply for ten acres, in round numbers; and it is to be ten acres of land which has been offered at auction during the preceding twelve months. That must mean twelve months preceding some particular circumstance; and the circumstance which arises is to my mind the motion taken by the volunteer himself. He says "I propose to select." The moment he proposes to select there arises a circumstance, that is to say, a date, from which the time is to be ascertained, and which fixes the land for which he may apply; that is to say, land passed at auction within twelve months preceding his application. Well, now, this being his right, we have got merely so far as this:—If you apply within these limits, your application may be refused; if you apply outside them, you have no chance at all. Then the regulation provides for the other necessity; namely, the consent by the other party to the transaction, and how that consent is to be obtained; and the third of these regulations provides that it is to be dealt with in the same manner as the lands applied for under the leasing clauses of the Act—approval by the Commissioner at court sitting, and confirmation by the Minister for Lands; that is to say, not inventing any new scheme, but adopting the scheme given in the 5th, 6th aud 7th sections, which say what shall be the way in which the approval shall be obtained. The moment the volunteer has applied for the land, the question arises whether he shall have it or not, and the law says all questions which arise under the Act—

shall be decided by the Commissioner who shall give his decision in open court subject to confirmation by the Governor in Council.

It has already been decided by the highest authority to which the colony is subject that that decision must be given in judicial form; that each party is entitled to be heard; and to argue what each thinks best for or against the position taken. I do not know how far the Commissioner is bound to give his decision; there are no laws which regulate him so far as I am aware; but, in deciding, he must carry out all the incidents to arriving at his decision in the legal manner in which courts of justice carry them out; though he is not, like this Court, fettered around by laws by which he must decide. He is, however, a person whose position is constituted by an Act of Parliament, and who is appointed by the Governor in Council for the time being, and consequently, probably his decisions are to be regulated by the policy of those who are for the time being carrying out the administration of the colony. It is possible that may be it. At all events, I do not know that there are any laws which bind him to give his decision one way or the other in the particular way in which judges of this Court are bound. He is a person who is put forward to accept the contract with, or create a statutory right in the volunteer to have this particular piece of land. If he does that, then his determination is still subject to the approval of the Minister for Lands, which is, I suppose, a sort of appeal, where it may be reviewed and reconsidered, and meet the approbation or otherwise of the Minister for the time being. If that approbation does not meet

with the approval of the people, another set of regulations are issued to the Commissioners. In this case we have not the approval of the Commissioner, nor the confirmation of the Minister. They are, in fact, refused. That being so, where is the plaintiff's case? He has not got it in the statute, nor in the regulations; consequently he must fail.

The section that was referred to by Mr. Lilley—section 47—certainly was one which for a time seemed to strike home, and to be formidable, and which, to my mind, seemed to deserve considerable attention. But if we take the word "allotted" there, in the strongest way it can be taken in favour of the volunteer, it would probably be an assignment of his portion of land applied for, but it does not say that that section is to override all the rest of the machinery of the Act; on the contrary, the other sections override it, because all questions are to be decided in a special way. Therefore, although this allotment might be an assignment of a particular portion of land, it is merely, that the particular piece of land applied for is allotted, but subject to questions arising; and it would seem that is the meaning the lexicographer would give the word. I think that behind this allotment of the land agent, there was the higher allotment of the Governor in Council.

My answer to questions Nos. 1 and 3 is,—No; and to No. 2,—No, only at their option. I have some difficulty in answering No. 2 with,—No. If answered simply, No, it seems to me that the Government could not approve, after further consideration.

MEIN, J.: The matters at issue here have been so fully considered by my learned brothers that there is little left to say. The plaintiff complains that he is not allowed to select a specific ten acres of land, and alleges, firstly, that the Government are bound to give him a free grant for these ten acres, because he is entitled to them under a statutory right conferred on him by section 98 of the *The Crown Lands Alienation Act of 1868*, apart from all regulations; and secondly, that, if not granted by that section, he is entitled to get them under the regulations, which the Governor in Council has made, pursuant to the power conferred on him by that section. Now, what obligation is there imposed on the Government by section 98? The only obligation thrown on them is this:—Where a volunteer has received his certificates from his commanding officer, and from the Colonial Secretary, they are to grant him ten acres of suburban land, or fifty acres of country land, as they may think proper. Take a humble illustration:—Suppose a farmer contracts with a farm servant to work for five days, and agrees that he will give him for his services ten bags of wheat on the completion of the five days' work. Does that confer on the servant a right to go in and select in the farmer's barn any ten bags? Would not the farmer carry out the contract, if he selected out of numerous bags of wheat in his barn ten bags of wheat in merchantable condition? The true meaning of the statute to my mind is that, where work has been performed by the volunteer, the Crown have the right of selecting ten or fifty acres as the case may be, unless, by the exercise of the power conferred on them, they choose to restrict their discretion by passing regulations.

This brings me to the second point of the plaintiff's case:—Do the regulations which have been issued so restrict the Crown as to compel them to grant the specific ten acres selected by the volunteer? On that arises the question raised by my learned friend, Mr. Chubb, as to the validity of the 3rd regulation of July, 1870. If my interpretation of the meaning of the 98th section of the Act is correct, that regulation is clearly *intra vires*, because, instead of restricting the rights of the volunteer, it simply restricts the discretion—the full and complete discretion—that the Crown had conferred on them by the section itself. If that regulation is *intra vires*, the plaintiff, before he can proceed in this case, will have to show that all the conditions imposed by that regulation have been complied with in his favour. The method of procedure with regard to the leasing of lands under the Act of 1868 have been so fully discussed by my learned

brothers that it is unnecessary to go over the ground again. They have described that, before the applicant for a lease can demand a specific lease, he must have received the approval of the Commissioner of the district, and, after that, and before the issue of his lease, must have the confirmation of the Minister and of the Governor in Council. None of these conditions have been fulfilled; consequently I think on both questions the answer must be,—No.

LILLEY, C.J.: As to the answer to question No. 2 in the special case, as to which my brother Harding has some doubt, the claim is that the plaintiff is entitled to have his application approved. He may be entitled to the favourable consideration of the Commissioner and of the Minister, but that he is entitled, after that consideration, to have their approval, I have already said, No. We cannot bind the discretion of officers exercising judicial functions. My meaning in answering the question in the negative was that, as they have not approved, they are not bound to do so. No doubt, if a proper case arose, the Government would act on the suggestion of the Commissioner.

Rutledge, A.G., stated that the Crown would not ask for costs after the intimation given by the Court.

Judgment for the defendant. The Crown forego costs.

Solicitor for plaintiff: *Bernays.*

Solicitor for defendant: *Gill, Crown Solicitor.*

IN THE MATTER OF A. F. B. CHUBB, A SOLICITOR.

Solicitor—Misconduct of.

The solicitor in this case had written two letters to persons demanding payment of money to clients, and threatened proceedings of a criminal nature.

Held, that, it was not essential to the exercise of the jurisdiction of the Court that the solicitor should have been guilty of a statutory offence, it was enough, if in the judgment of the Court, he had been guilty of such conduct as rendered him unfit to remain on the Roll of the Court.

Held, also, that the solicitor in this case, having merely acted ignorantly and foolishly, and having previously borne a good character, was not deserving of the highest form of punishment.

MOTION to make absolute a rule *nisi*, calling upon the solicitor to show cause why he should not be struck off the roll of solicitors of the Court.

Lilley, on behalf of the Law Association, at the June sittings of the Court, obtained the rule *nisi*, returnable at the August sitting.

The facts are, that the solicitor had written letters to two persons, demanding payment of amounts due to clients, and threatening, in the first instance, that, failing payment, legal proceedings, constructively of a criminal nature, would be taken; and, in the second instance, that "criminal proceedings" would be instituted. The letter in the first case was as follows:—

Bundaberg, December 20th, 1886.

MR. T. D. BALL, Isis.

SIR,—I am instructed by Mr. Olivey to apply to you for the payment of the sum of £16 15s., being amount due by you to him. My client informs me that you went insolvent after the debt was incurred, and that you informed him you did not return him as a creditor in your estate, as you promised to pay him in full, and led him so to believe until you met him to-day. I may mention for your information that your action in not returning in your statement of affairs your indebtedness to him is a serious matter, and you have rendered yourself liable to be punished under the Insolvency Act I, therefore, demand from you on behalf of my client, payment forthwith of the above amount, together with £1 1s. my costs, otherwise my client intends instituting legal proceedings without further notice.

I am, Sir, yours obediently,

A. F. B. CHUBB.

The money was not paid; and, owing to the client being unable to furnish his costs, no action was brought against Ball. The facts in this letter were not questioned in any of the affidavits filed by the solicitor. The solicitor, in an affidavit of his own, deposed that he did not intend to threaten with criminal proceedings—

but simply to draw attention to the position he had placed himself in by omitting Henry Olivey's debt from his statement of affairs. The legal proceedings intended by me in my said letter were a civil action and no other.

The solicitor concluded by expressing his regret at having worded a letter in such a manner as to suggest the idea of criminal proceedings, and humbly craving the indulgence of the Court for his error.

An affidavit by Olivey supported the statement that a civil action was meditated.

The letter in the second case was as follows:—

A. F. B. CHUBB,
Solicitor, Notary Public.

Bundaberg, May 20th, 1887.

R. H. DYBALL, ESQ., Bundaberg.

SIR,—I am instructed by Mr. R. Wood to apply to you for payment of the sum of £10 16s. 6d., being amount of client's money recovered by you from Mrs. H. Hunt in the month of October last, of which amount my client holds your dishonoured cheque for £10 5s. 6d., and I have to inform you that unless this amount, viz.: £10 16s. 6d., together with 10s. 6d. my costs, be paid to me by 6 o'clock this day, my instructions are to institute criminal proceedings against you in respect to the same without further delay.

I am, Sir, yours obediently,
A. F. B. CHUBB.

In this case the money was paid, with the costs demanded. Later the solicitor wrote the following letter to Mr. Dyball, who had been a solicitor of the Court and had recently been struck off the roll.

Bundaberg, May 27th, 1887.

R. H. DYBALL, ESQ., Bundaberg.

Re Wood.

DEAR SIR,—Enclosed herewith I enclose my cheque for 10s. 6d., which amount I beg to return as I did not intend taking any costs from you in this matter.

Yours truly,
A. F. B. CHUBB.

In this case, Dyball had given Wood a cheque in payment of the amount owing, but, on presentation on four different dates, it was dishonored. Wood then instructed the solicitor to demand payment from Dyball, and, being advised by the solicitor that he "could prosecute" Dyball for withholding the money, instructed him to institute proceedings, if payment were not made. In his own affidavit, the solicitor stated that he had told Wood that he thought he could prosecute Dyball for appropriating his money. In conclusion he says as follows:—

I deeply regret that I should have made use of a threat of criminal proceedings in my letter to the said Mr. Dyball of twentieth May when demanding payment of the amount justly owing by him to Wood. I humbly acknowledge my error, and submit myself to the indulgence of this Honorable Court.

Lilley, at the August sitting of the Court, moved the order absolute.

Sir S. W. Griffith, Q.C., appeared to show cause on behalf of the solicitor. The solicitor had not intended to threaten, but had acted in error. He admitted the gravity of that error, and submitted himself to the Court. An affidavit was read annexing a testimonial as to character by a number of residents of Bundaberg and district.

Lilley replied. The Association had felt it their duty to bring the matter before the Court; they could not take it on themselves to distinguish this case from *Swanwick's* case, 2 Q.L.J., 1. He cited also *In re Dyball*, 3 Q.L.J., 9.

C. A. V.

At the September sittings, the judgment of the Court was delivered, as follows, by—

LILLEY, C.J.: There are two charges of misconduct against the solicitor in this matter. In each he is accused of having, whilst demanding money payable to a client, threatened that, if the payment was not made, criminal proceedings would be instituted against the party who was liable to pay the money. Some argument took place on the meaning of the letters sent by the solicitor, but we think there can be no doubt that in each case the intimation was, that procedure in a criminal jurisdiction would be set in motion if the money were not paid.

We adhere to the rule laid down in previous cases that "it is not essential to the exercise of our jurisdiction," even in its severest form, "that "a practitioner should have been guilty of a statu- "tory offence; it is enough if, in the judgment of "the Court, he has been guilty of such conduct "as renders him unfit to remain upon the Roll of "the Court—to be entrusted, in fact, with the "power of the Court which he can set in motion "in certain particulars at any moment."

Our jurisdiction being exemplary and severe even to the extent of professional extinction of the wrong doer, we must be reasonably satisfied that the misconduct of which complaint is made has been established. In coming to a decision, we may use not only the material actually brought

before us as legal evidence; we may have regard to the known character and conduct of the accused. The Court has certain domestic knowledge—so to speak—of its own officers, and, if the character of the particular officer has been without stain, it must weigh with us in coming to a conclusion, whether he has or has not been guilty of deliberate misconduct, or of an act due to folly or ignorance. It might be needful to withdraw our executive authority from an officer who had frequently displayed the incapacity of a foolish or ignorant person. Now, in this instance, our officer has hitherto had no known blemish on his character; his fellow townsmen and clients have certified that "they have found him strictly honest and straightforward in money matters, an upright, sober, civil, and respectable fellow townsman, and that his reputation as an upright solicitor in the opinion of the inhabitants of Bundaberg is highly esteemed." We have come, not without some hesitation, to the conclusion that the solicitor acted ignorantly and foolishly, but not in such a way as to call for the severest form of punishment. We take a more lenient view of his conduct, and order our censure to be recorded, that he pay the costs of these proceedings as between solicitor and client, and that, on default of payment, he be suspended from practice until he has fully obeyed the order of the Court.

As the mouthpiece of the Court I therefore censure Mr. Chubb for his foolish and ignorant conduct; and I hope that the smart of this correction will keep him in the right track for the future.

Solicitor for Queensland Law Association: *Osborne.*

Solicitors for A. F. B. Chubb: *Daly & Hellicar.*

IN CHAMBERS.

LILLEY, C.J. 6th, 26th August, 1887.

PENFOLD *v.* CARTER.

Capias ad respondendum — Application for — Voluntary Payment of Another's Debt.

An application for the issue of a writ of *ca. re.* will not be granted where it appears that the debt upon which the application is based arises out of disputed accounts, or where the debt arises by the voluntary payment by the applicant of liabilities of the debtor, the applicant not having been compelled or requested to pay the same.

ON 6th August, application was made by plaintiff's solicitors for issue of a writ of *capias ad respondendum* against defendant. Plaintiff's action was on a specially endorsed writ "for £34 2s. 6d., being £11 7s. 6d., money paid by plaintiff for and on account of defendant, and £22 15s. 0d., debts absolutely assigned to the plaintiff by F. S. Brown and G. Marshall, of which express notice had been given to the defendant, and for interest thereon." Both the payments by plaintiff, and the assigned debts were money paid on account of defendant in respect of interest due on a mortgage executed by him, in favor of R. Cruise, over a piece of land, known as the Oatlands Estate, sold by defendant to plaintiff, Brown, Marshall, and others, as members of a land syndicate, in which defendant himself held shares. Plaintiff in his affidavit in support of the application swore to the several amounts of the claim, and further that the defendant had informed him that he intended leaving Brisbane for Sydney, New South Wales, on 6th August.

The Chief Justice refused the application, as the evidence of authority from defendant to pay was insufficient.

Later in the day the application was renewed on a further affidavit of plaintiff, in which he stated that he, Brown, and Marshall, had paid the several amounts in settlement of two overdue promissory notes for £62 10s. each, made by defendant in favor of Cruise, in order to avoid foreclosure over the Oatlands Estate; and that about 18th July, 1887, defendant's solicitors had tendered payment to plaintiff's solicitors of the sum of £125 and interest, less the sum of £81 14s., which defendant claimed as due from the syndicate to him, and that plaintiff's solicitors declined to accept less than the full amount of £125 and interest. Plaintiff further said that he was in-

formed by Brown and Marshall that they were not, and for himself he said that he was not, indebted to defendant in any sum. It did not appear in these affidavits that defendant was a member of the syndicate.

Upon this, His Honor granted leave to issue the writ.

On 26th August, application was made by defendant, on an adjourned summons, to rescind the order of 6th August, with costs against plaintiff.

Defendant's affidavits, on which this application was made, stated that he had sold the Oatlands Estate on terms to the syndicate, had mortgaged it to Cruise, and then left for England. During his absence, the promissory notes given by plaintiff and the other members of the syndicate fell due, and were not paid; two promissory notes of his own, which he had given Cruise for payment of interest on the estate also fell due, and, not having funds, his bank could not meet them. The plaintiff and others, he was informed, had contributed and paid these, but not with his consent or at his request. On returning to Brisbane, he sued the makers of the overdue notes, and was paid. After an auction sale, owing to the inability of the syndicate to give a buyer, Robinson, his title, they authorised plaintiff to refund the purchase money, £81 14s., to him; this he did, and had not been repaid. Plaintiff, Brown, and Marshall had demanded payment of £125, the amount of his overdue promissory notes, with interest. As their failure to meet their promissory notes had led to his inability to meet his, he declined to pay interest. The mortgage to Cruise had been paid off, and the transfer of a clean title made to the trustees of the syndicate, before the commencement of this action. He denied having expressed any intention of leaving the colony on 6th August.

In the affidavits filed on behalf of the plaintiff, the authority to defendant to pay Robinson was denied. No fresh allegation of authority from defendant for the payment of his overdue notes was made; but necessity of preventing a foreclosure was alleged.

Lilley applied on behalf of defendant for the rescinding order; and submitted that there was no ground for arresting defendant. It was a question of disputed account between partners.

Feez opposed the summons for plaintiff.

LILLEY, C.J.: I should never have granted this *ca. re.* if I had known this was a matter of conflicting accounts; I should have left the plaintiff to pursue his other remedy. There is no legal debt. There was here a voluntary payment, neither compulsory nor requested. One man cannot take on himself to pay another's debts, and then turn round and sue him for them. I did not think there was any authority here when the application was first made. In future I will not indicate the weak point in an affidavit. Solicitors should be very cautious; clients are too anxious to prove that which will gain them their object. I will look over the affidavits before making my order.

On 29th August, HIS HONOR granted the application in the following terms:—Order, rescind the order for arrest. Costs of this application to be paid by plaintiff; also, all costs consequent on the arrest, and putting in bail, or deposit in lieu thereof. The Sheriff to refund the money deposited, and the plaintiff to pay defendant any costs he may have to pay the Sheriff.

Solicitors for plaintiff: ***Bunton and Little.***

Solicitors for defendant: ***Thynne and Goertz.***

LILLEY, C.J. 27th and 31st August and 2nd September, 1887.

BASHFORD *v.* SAWYER.

Capias ad respondendum—Writ, error in—Common Law Process Act of 1867 (31 Vict. No. 4).

An order having been obtained for the issue of a writ of *ca. re.* against the defendant for the amount of £111 14s. 1d., the writ was issued, in error, for £112 and £10 costs, and the defendant was placed in custody thereunder.

On an application for an order to set aside the order and writ on the ground that the writ directed the defendant to be held to bail for a larger amount than the debt claimed.

Held, that, the order and the writ must be set aside, and the defendant discharged from custody.

On 27th August, plaintiff's solicitors applied for an order from The Chief Justice for a writ of *capias ad respondendum* to issue against defendant for the amount endorsed on the writ, £111 14s. 1d., for goods sold and money lent.

The application was made on the affidavit of plaintiff, setting out the cause of action and the intended immediate departure of defendant from the Colony. The 4th paragraph was to the effect that the absence of the defendant from Queensland would "materially prejudice" plaintiff in the prosecution of his action.

The Chief Justice refused the application on this evidence, as insufficient.

The application was renewed on a further affidavit by plaintiff, who alleged that defendant's absence would "defeat" his "action unless defendant be forthwith apprehended."

His Honor made the order; and the order and writ were the same day issued, in error, for £112 and £10 costs, and the defendant placed in custody thereunder.

On 31st August, his solicitors applied to His Honor on a summons for an order to set aside the order and writ on the ground that the writ directed defendant to be held to bail for a larger amount than the debt claimed by plaintiff, with costs against plaintiff; *Common Law Process Act of 1867*, s. 48.

His Honor said there was evidently an error, and made an order *nisi* to set aside the writ, with costs, returnable on 2nd September.

On 2nd September, accordingly, defendant's solicitors applied for the order absolute. Plaintiff's solicitors offered no opposition.

His Honor made the order absolute to set aside the order of 27th August and the writ, and to forthwith discharge the defendant from custody. Plaintiff to pay all costs consequent on the arrest, and putting in bail, or deposit in lieu thereof. The defendant to be restrained from bringing any action against plaintiff in respect of anything done under the writ.

Solicitors for plaintiff: *Foxton and Cardew.*

Solicitors for defendant: *Daly and Hellicar.*

LILLEY, C.J. 16th and 28th Sept., 1887.

In re THE SETTLED LAND ACT OF 1886, AND *In re* THE SETTLED ESTATE OF JAMES TOOHEY, DECEASED.

The Settled Land Act of 1886 (50 Vic. No. 13), Sects. 5 and 6 (Subsections f and i), 42 and 44—Will—Tenant for life—Costs.

The testator by his will, after several specific devises, gave the residue of his estate to his wife and to two trustees upon trust, to receive the income and profits thereof during his wife's life and to apply the same or part thereof in or towards the maintenance of his wife and children, such allowance to be in the absolute discretion of the said trustees. The said will contained further directions as to the disposal of the estate after the death or marriage of the wife, but there was no specific gift in the will to any one during the life of any person. The income from the estate was not sufficient to pay even the taxes thereon.

On a petition by the wife and children of the testator for a declaration that the petitioners had the powers of a tenant for life under the *Settled Land Act of 1886*.

Held, that there was no provision in the will which would, before the passing of the said Act, have conferred a life-tenancy on either the wife or the children, and there was nothing in the said will which enabled the Court to say that the wife or children, or any of them, were entitled to exercise the powers of a tenant for life by force of the statute. *In re Atkinson, Atkinson v. Bruce*, L.R., 30 Ch. Div., 605; on appeal, 31 Ch. Div., 577, followed.

THE testator, James Toohey, executed his will on 20th November, 1883, appointing Thomas Burke and William Smith his executors and trustees; and died two days later. In it after a number of specific devises, he disposed, as follows, of the greater part of his estate:—

I give devise and bequeath unto my said wife the said Thomas Burke and the said William Smith their heirs executors administrators and assigns respectively all my real and personal property whatsoever not hereinbefore otherwise disposed of (except estates vested in me as trustee or mortgagee) upon the trusts and with and subject to the powers and provisions hereinafter declared that is to say Upon trust to receive the income and profits thereof during my said wife's life and to apply the same or so much thereof as my said trustees Thomas Burke and William Smith shall think expedient and sufficient in or towards the maintenance and education or otherwise for the benefit of my said children such allowance to be in the absolute discretion of my trustees the said Thomas Burke and William Smith and after the decease of my said wife or marriage I direct that my said trustees or trustee shall at their or

his discretion sell get in and convert into money all the said residue of my said real and personal estate or such parts thereof and at such times as they or he may deem expedient and shall invest the proceeds thereof in their or his name in some or one of the modes of investment hereinafter authorised and shall stand possessed of the said trust property and the investments representing the same upon the trusts following that is to say upon trust for all my children who being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry in equal shares and if there shall be only one such child the whole to be in trust for that one child * * * * * * Provided always that if any child of mine shall be an infant at my said wife's death or the second marriage of my said wife my trustees may apply the income of the expectant share of such infant for or towards his or her maintenance and education and shall accumulate the said income if and so far as the same shall not be required for the purposes aforesaid by investing the same and the resulting income thereof to the intent that the accumulations may be added to the principal of the said share and follow the destination thereof Provided also that my said trustees may at any time raise the whole or any part of the vested or expectant share of any child and apply the same for his or her advancement or benefit.

There was no personalty left, and the realty comprised in these trusts was subject to certain leases the rents of which were not sufficient for even the payment of municipal and divisional board rates. The trustees were consequently receiving no income from the estate which could be devoted to the maintenance of the testator's wife and children. The wife and children therefore filed a petition praying—

That it may be declared that your petitioners have the powers of a tenant for life under the said Act *(The Settled Land Act of 1886)*,

and that the costs of the application, taxed as between solicitor and client, be paid out of the property subject to the said trust settlement.

Sir S. W. Griffith, Q.C., (*Pain* with him), appeared on behalf of the petitioners; and *Wilson* for the trustees.

Sir S. W. Griffith: The question for the Court was, whether the petitioners had the powers of a tenant for life? They asked the direction of the Court thereupon under s. 42 of *The Settled Land Act*. As to definition of tenants for life, he cited s. 5 and s. 6, subdivisions *f* and *i*, of that Act. As to their claim to be tenants for life, he referred to *In re Atkinson, Atkinson v. Bruce*, 30 Ch.D., 605, and 31 Ch.D., 577. The reason of that decision was that the objects were not certain. As to costs, he referred to ss. 42 and 44, *The Settled Land Act*. The circumstances of this case were hard. Though the estate was a large one, the petitioners were in straitened circumstances, with nothing coming from the estate to meet the expenses of living and education. It was very desirable that the Court should help them if possible. Their only chance of relief was by a sale of part of the property; the rents from an unimproved estate, such as it was, were insufficient for their maintenance. He asked for the declaration prayed for.

Wilson: The respondents were anxious for the reasons stated, that the declaration should, if possible, be made.

On the 28th September, His Honor, THE CHIEF JUSTICE, delivered the following judgment:—

This is a petition by the widow and children of James Toohey, deceased, for a declaration that they have the powers of a tenant for life under the above-mentioned Act. James Toohey, now deceased, by his will made on the 20th November, 1883, after several specific devises, gave the residue of his estate to his wife, and to Thomas Burke and William Smith upon trust to receive the income and profits thereof during his wife's life, and to apply the same or so much thereof as his said trustees Thomas Burke and William Smith should think expedient and sufficient in or towards the maintenance of his said wife, and in or towards the maintenance and education, or otherwise for the benefit of his children, such allowance to be in the absolute discretion of his trustees, Burke and Smith, and after the death of his wife or marriage, he directed his trustees to sell, get in, and convert into money at their discretion all the residue of his estate, and to stand possessed of it upon trust for all his children who should attain the age of 21, or being daughters, should attain that age or marry; with a direction as to investments by his trustees who might use their own absolute discretion, and with provisoes that, if any child of his should be an

infant at his wife's death or second marriage, his trustees might apply the income of the expectant share of such infant for or towards his or her maintenance and education, or should accumulate the said income, if, and so far as the same should not be required for the purpose aforesaid, by investing the same and the resulting income thereof to the intent that the accumulations might be added to the principal of the said share, and follow the destination thereof, and that the trustees might at any time raise the whole of the vested or expectant share of any child, and apply the same for his or her advancement or benefit. There does not seem to be in the will any specific gift to any one during the life of any person. There is a trust which would continue during the life or widowhood of the testator's wife, but the amount to be applied for the maintenance of her or of the children is in the absolute discretion of the trustees, a power with which the Court cannot interfere unless *mala fides* can be shown with regard to its exercise. (*Gisborne v. Gisborne*, 2 App. Ca., 300). Had the wife, or the wife and children, or either of them, been separately or conjointly entitled to the income of the estate under the will, during the life of any one or more of them, a life tenancy might have existed, in respect of which the person or persons entitled to the income might for the purposes of the Act have been tenant for life "as a person for the time being entitled to possession of the settled land for his life" (Sec. 5 of the Act), *per* Pearson, J., *In re Atkinson*, 30 Ch. Div.; or such person or persons might have been entitled to exercise the powers of a tenant for life under the Act (Sec. 6, subdivisions *f* and *i*), even though the tenancy for his or her own life or the life of any other person had been liable to cease in any event during that life, such as the death or marriage of the widow in this case, or whether the person was entitled to the income until forfeiture of the interest therein in any event, such as the death or marriage of the widow in this case. There is no provision in the will of Toohey which would, before the passing of the Act, have conferred a life tenancy on either the wife or children, and there is nothing in that instrument which enables me to say that the widow, or children, or any of them, are entitled to exercise the powers of a tenant for life by force of the statute. I am unable to distinguish this case from the substantial principle underlying the case cited by counsel at the Bar, *In re Atkinson*, *Atkinson v. Bruce*, 30 Ch. Div., 605, and on appeal, 31 Ch. Div., 577. The persons who ask me to declare that they have the powers of tenants for life, have, in fact, no tenancy for life, and no power that they can enforce against the trustees under the will. The estate is of great value, but the income is not sufficient to pay the taxes, let alone anything for the support or maintenance of the testator's widow or children. I regret my inability to make the required declaration, more especially as the trustees are not only willing but anxious to obtain money for exercising their trust in good faith for the benefit of the objects of the testator's "allowance," as he describes it in his will.

I am, therefore, constrained by the authorities of the English cases, to say that the petitioners have not the powers of a tenant for life under the Act. The costs of all parties will be paid out of the estate.

Apart from my judgment, I may further say that I hope the time will soon come when the barbarous power of disposition of his estate by a testator in regard to his wife and children, will cease to be a part of the law of this colony, as a civilised community. I have considered the will very carefully, and with the greatest anxiety to help all parties, seeing that all are willing to obtain the means of support for the wife and children, but I cannot see my way out of the difficulty. I think the power of sale by the trustees would have been inserted in the will by the testator if he could have foreseen this difficulty. The power of sale might be easily obtained by a short Act of the Legislature.

Solicitors for petitioners: *Bunton & Little.*

Solicitors for respondents: *Wilson, Wilson & Brown.*

LILLEY, C.J. 30th Sept., 1887.

In re THE SETTLED LAND ACT OF 1886, AND *In re* THE WILL OF JOHN ALFRED BUCHANAN, DECEASED.

The Settled Land Act of 1886 (50 Vict. No. 13), Sec. 66, Subsec. 2 (b) and Subsec. 1; Secs. 10; 30 (Subsec. 2); 34 and 35—Will—Power to sell—Investment of proceeds—Costs.

ORIGINATING summons by Jessie Jane Buchanan, testator's widow, life tenant under the will, for leave to sell, under direction of the Court, unproductive or least productive lands in the settlement under the testator's will; to apply capital money for building a dwelling-house for the widow; and for approval of a scheme for the improvement of the settlement; with costs to be taxed as between solicitor and client out of the estate, subject to the said settlement.

Testator died on 19th October, 1886. By his will he devised and bequeathed all his real and personal estate in trust to William Wilson and Joseph Buchanan, and directed that the whole should be converted into money and invested in Government or real securities, and that the income arising therefrom should be paid to his wife, for her life, so long as she remained unmarried; in case of marriage, to be reduced to an annuity, and remainder in trust for children. He appointed Joseph Buchanan and William Wilson his executors. Joseph Buchanan renounced probate, and Mrs. Buchanan was granted letters of administration in the absence of the other executor from the colony. Later, he also renounced. Mrs. Buchanan on 7th April, 1887, under powers conferred by testator's will, appointed William Henry Miskin and George Edwin Marshall trustees under the will.

The real estate was estimated at about £100,000, and the present annual income at £3,600. There was not, amongst the buildings thereon, any that was suitable as a residence for the widow and family. There was a vacant allotment on Wickham Terrace, in the city of Brisbane, producing no income, on which the widow had requested the trustees to build such a dwelling-house. They now proposed to sell some of the unproductive properties under the powers conferred by the will, and by direction of the widow, and to expend £4,000 on the erection of a dwelling-house on the site proposed by her. They further proposed to sell unproductive property sufficient to raise money for the expenditure of £3,000 and £250 in repairs to two town properties in the estate, namely, "The Sovereign Hotel," and "The Post Office Hotel," by means of which extended leases at profitable rents could be secured.

Mrs. Buchanan had remained a widow; and testator's family consisted of five infant children.

These facts were set out in the joint affidavit of the trustees, who approved of the proposed improvements; and a scheme embodying the improvements proposed was also filed.

Lilley, for the life tenant, applied for an order accordingly. The life tenant wished the unproductive land to be sold, and to make the proceeds "capital money" under section 66, subsection 2 (*b*) of *The Settled Land Act of 1886*. He referred also to section 66, subsection 1; section 10; section 30, subsection 2; section 34 (*k*) and (*s*), and section 35. The trustees had power to sell all the property; this application was for leave to invest the proceeds in a particular way—to have them controlled.

Macpherson was present to consent on behalf of the trustees.

THE CHIEF JUSTICE said, I will make this scheme an exhibit—No. 1—in this matter. My order is,—Leave to the trustees to sell, as applied for by the summons, and to apply the capital money according to the scheme; costs of all parties out of the estate.

Solicitor for applicant: *Bernays*.

Solicitors for trustees: *Macpherson, Miskin & Feez*.

LILLEY, C.J. 30th Sept., and 12th Oct., 1887.

In the matter of THE REAL PROPERTY ACTS OF 1861 AND 1877, AND *In the matter of* THE APPLICATION OF THOMAS SCANLAN.

The Real Property Act of 1861 (25 Vict. No. 14), Secs. 98 and 99, and The Real Property Act of 1877 (41 Vict. No. 18), Secs. 12, 14, 15, and 38—Caveat—Withdrawal of—Registration.

On the 25th of June, 1886, D. sold a piece of land to H., and having afterwards attempted to withdraw from the bargain, H., on July 1st, 1886, lodged a caveat against the land in the registry, which was registered on July 15th, 1886.

On the 26th June, 1886, D. sold the same piece of land to S., and on the 14th July S. paid the purchase-money therefor, and received from D. a memorandum of transfer and the certificate of title for the said land, which, however, S. did not lodge in the registry till the 13th of August, 1886.

H. afterwards brought an action against D., and on the 2nd of March, 1887, obtained a decree for specific performance of the agreement for the sale of the said land.

On an application for the withdrawal of the said caveat,

Held, that *The Real Property Act* recognises specific performance of a contract for the purchase of land under the Act.

Held, also, that the caveat of H. being first on the register, protected the prior good equitable title of H. against any effort of S. to secure a paramount legal title by registration.

APPLICATION on summons by Scanlan, calling on R. Heaslop and all parties to show cause why a caveat entered by Heaslop against land under *The Real Property Acts*, standing on the register as owned by one Donohue, which had been sold by Donohue to Scanlan, should not be withdrawn, and why Heaslop should not pay costs of the application.

Donohue, on 25th June, 1886, bargained and sold a piece of land to Heaslop; on the 30th June, Donohue tried to withdraw from the bargain; and Heaslop's solicitors, by his instruction, entered a caveat against the land. The caveat was lodged in the registry on the 1st July, but it was not entered upon the register until the 15th. On the 26th June, Donohue had sold the same land to Scanlan, and on the 14th July Scanlan paid the purchase money, and received the memorandum of transfer, with certificate of title, from Donohue. He did not, however, lodge these in the registry until the 13th August.

Byrnes, on behalf of the applicant: The application was brought under ss. 98 and 99 of *The Real Property Act of 1861*, and s. 38 of the amending Act of 1877. Applicant's position was that of an innocent person with equal equity. *Blackwood v. London Chartered Bank of Australia*, 5 P.C., 92, at 111. He had the documents most favorable for title under the Statute—the certificate of title and memorandum of transfer. Referred to s. 12 of *The Real Property Amendment Act of 1877*; it was a further enactment of s. 43 of the original Act. The caveat was the only block in applicant's way; he produced the *indicia* of title, and had been the more diligent. A caveat was between the Registrar and the would-be registering party, and was only a block until the title of the two claimants for registration could be ascertained. Scanlan had now shown his title.

Lilley showed cause: If the matter had been under the old system of conveyancing in equity, Heaslop would be entitled to judgment. If the equities were in other respects equal, he had priority as to time. The caveat was in the registry on 1st July; the delay of the Registrar in not putting it on the register until the 15th, should not affect the caveator. Had the caveat not been on the register, and Scanlan failed to search, the plea of purchase for valuable consideration would have gone.

LILLEY, C.J.: But surely enquiry in the registry is carried further than by simply looking at the register book. Would not the question be asked on making a search, whether a caveat had not been received?

Lilley: Certainly it should; a caveat might have come in only a few minutes previously to search. Referred to *Jackson v. Rowe*, 2 Sim. & Stu. 472, at 475. As to s. 12 of the amending Act of 1877, see s. 109 of principal Act, and s. 51 of the amending Act.

LILLEY, C.J.: Sections 14 and 15 of th

amending Act apply here. Refers to *McGlone v. Registrar of Titles*, 2 Q.L.J., 182.

Byrnes: The whole Act is governed by the latter part of s. 12.

C. A. V.

On the 12th October. THE CHIEF JUSTICE delivered judgment as follows:—

Scanlan applies for an order for the withdrawal of a caveat entered by Heaslop, against certain lands under *The Real Property Act*. Heaslop and Scanlan, respectively, claim title as a purchaser for value of the lands from Donohue, the registered proprietor. The title of Heaslop is founded on an agreement for purchase, admitted to be sufficient under the Statute of Frauds, and prior in time to the alleged title of Scanlan. First, as to Heaslop's title:—On the 25th June, 1886, by means of correspondence and telegrams, the agreement for sale by Donohue to Heaslop was complete. On the 30th June, Donohue tried, by telegram, to withdraw from the bargain. Thereupon Heaslop instructed his solicitors to enter the caveat, which was accordingly done on the 15th July, 1886, by the Registrar. The caveat, it is sworn, had, however, been lodged in the registry by the solicitors of Heaslop for immediate registration, on the 1st Jnly. No official record of this date of 1st July appears on the entry of caveat in the register, if the copy before me is correct. I have therefore treated the caveat as of the 15th July, for the purpose of this decision.

An action had been commenced, and a decree for specific performance of the agreement with Heaslop was made against Donohue on the 2nd March, 1887. It was stated by Scanlan's counsel that they "lay by" during the progress of that suit. *The Real Property Act* recognises specific performance of a contract for the purchase of land which is under the Act, no provision being made for the contract being a registered transaction [sec. 96], and although that section relates in terms to the vendor, it would give a reciprocal right to the purchaser.

As to Scanlan's title:—On the 26th June, 1886, he agreed with Donohue to purchase from him the land which had been previously sold to Heaslop. On the 14th July, 1886, he completed the purchase by paying the money, and obtaining a memorandum of transfer; and he also got, on the same day from Donohue, the certificate of Donohue's title as registered proprietor. We have seen that Heaslop could not have obtained these instruments from Donohue, who had determined to break his contract with him by selling for a higher price to Scanlan. Both men—Heaslop and Scanlan—are innocent purchasers for value, and the question is, has Scanlan in some way secured a better title than the prior title of Heaslop? On the 1st July, Heaslop, it is alleged, lodged his caveat, and on the 15th, certainly, the Registrar placed it on the register, without a note of the previous lodgment; and, on the 13th August following, Scanlan lodged the memorandum of transfer and certificate of title, with a request that he might be registered as proprietor, and receive a certificate of title in his own name. The legal title to land under our *Real Property Act* is by actual registration;—*Blackwood v. London Chartered Bank of Australia*, 5 L.R., P.C., 112; *Registrar of Titles v. Paterson*, 2 L.R., App. Ca., 117; and *In re Wildash*, 1 Q.L.R., Pt. 2, 47. The memorandum of transfer under the Act, is merely an instrument "executed with a view of transferring the estate or interest in the land" (Interpretation Clause, *Real Property Act of 1861*), and no instrument is effectual until registered. On the evening of the 14th July, Heaslop and Scanlan were in this position; neither of them had a title completed by actual entry on the register, that is, a legal title as distinguished from an equitable one, but either of them, being a purchaser for value, could obtain priority of the other by getting in the legal title, or, in other words, securing priority of registration. As between the two, on their equitable titles, Heaslop was first in time, and therefore stronger in right. On the following morning (15th July), Heaslop's position was further strengthened. He had lodged his caveat, which

was on that day entered on the register by the Registrar, and had obtained a statutory protection of his prior equitable right. The effect of a caveat was expressly decided by me in the case, *In re Wildash*. In that case I find (at p. 53) I said, "The caveat * * * prohibits any subsequent dealing under the Act, and with greater force outside the Act, in derogation of the claim it protects, if it is well founded."

As between the unregistered transactions of Scanlon and Heaslop, the caveat protected the prior good equitable title of Heaslop against any effort of Scanlan to secure a paramount legal title by registration. Scanlan's title, if registered, could only take effect from the 13th August, when he delivered the transfer and certificate to the Registrar: secs. 14 and 15 of 41 Vic., No. 18, *The Real Property Act of 1877*; consequently he must fail, as Heaslop's prior title was protected certainly from the 15th July. Heaslop was, in fact, first on the register on that day. The caveat, which is an "instrument" under the Acts, would protect him from the 1st July, under secs. 14 and 15 of the Act of 1877 already quoted, if it was actually in the registry on that day.

The plain, practical precaution for a purchaser, is to have the certificate of title and memorandum of transfer deposited in the registry by the vendor, and to ascertain that there is no caveat there before he pays his purchase money. The same care should be observed in mortgage, and other transactions under the Act. People cannot learn too soon that dealings outside, and without reference to the registry, are hazardous. The summons is dismissed with costs.

Solicitors for applicant:—*Thynne & Goertz.*

Solicitors for caveator:—*Wilson, Wilson & Brown.*

OCTOBER SITTINGS OF THE FULL COURT.

BEARUP *v.* BARKER.

The District Courts Act of 1867 (31 Vict. No. 30), Sec. 108—The Gold Fields Act of 1874 (38 Vict. No. 11), Secs. 47, 71, and 73—Appeal.

A dispute having arisen between the parties in this action as to a certain claim, the Warden summoned them before him in order that he might settle the matter of the complaint. The parties accordingly went before him and were heard, and submitted to his decision.

One of the parties afterwards appealed to the District Court under section 71 of *The Gold Fields Act of 1874*, but the judge refused to hear the appeal on the ground that section 73 of *The Gold Fields Act of 1874* had not been complied with. Section 73 is as follows:—"No such appeal shall be heard unless at the hearing of such appeal a copy of the plaint and notice of defence and of the minute of such decision and of the order thereon signed and certified under the hand of the Warden or his clerk shall be produced to such Court and the Warden is hereby required to lodge or cause to be lodged such copy."

It appeared that the judge had before him a copy of the entry of the grounds of complaint, of the defence or cross-relief, and of the decision of the Warden, under sec. 47.

Held, that section 73 of *The Gold Fields Act* was sufficiently complied with, and that the judge was bound to hear the appeal."

RULE *nisi*, under section 108 of *District Court Act of 1867*, granted by Mr. Justice Mein on the application of the defendant, calling upon the Judge of the Northern District Court and on plaintiff to show cause, before the Full Court at the October sittings, why the said judge should not hear an appeal from the decision of the Goldfields' Warden at Charters Towers.

On 2nd July, 1887, Bearup, the respondent, wrote as follows to the Warden at Charters Towers:—

SIR,—I have the honor to request you to forfeit the mining interest known as Protection Tunnelling Area, No. 1,394, on the following grounds, viz.:—That the applicant for the said tunnelling area, by fraudulently concealing the fact that the said area overlapped Prospecting Tunnelling Area, No. 1,333, procured himself to be registered as owner, contrary to *The Gold Fields Act of 1874* and the regulations thereunder.

J. B. BEARUP.

To the Warden,
Charters Towers Goldfield.

On the 4th July following, the Warden wrote as follows:—

Warden's Office, Charters Towers,
4th July, 1887.

C. F. BARKER, Esq.,
Charters Towers.

Sir,—Complaint having been made to this office in writing that you became the holder of Prospecting Tunnelling Area, No. 1,394, by fraudulently concealing the fact that the said area overlapped Prospecting Tunnelling Area, No. 1,333, I have the honor by direction to call upon you to show cause in the Warden's Court, Charters Towers, at 10 a.m. on Friday, 8th day of July next, why the said Prospecting Tunnelling Area, No. 1,394, should not be forfeited.

I have, &c.,
LIONEL LUKIN,
Assistant Mining Registrar,
Pro Warden.

The parties attended on the 8th July; and the Warden, having taken the evidence tendered on both sides, decided in favor of the applicant, Bearup, and made an order for the cancellation of tunnelling area 1,894, and that the said area be written off the register.

Barker, the objector, appealed to the Northern District Court, and the appeal was heard on the 11th August at Charters Towers. The solicitor for the respondent, Bearup, took a preliminary objection, under section 71 of *The Gold Fields Act of 1874*, that there was no case on which the appellant could come to the Court by way of appeal, there being no plaint or notice of defence, within the meaning of the 73rd section, in the Court below; and that there were no parties within the meaning of the 71st section.

The judge reserved the point, and heard the appeal. After taking evidence, he refused to hear the appeal on the ground that it was not a case within the meaning of section 71 of *The Gold Fields Act*, and that section 73 had not been complied with.

Appellant's solicitor applied to the judge to state a special case, but the judge refused on the ground that there was no point of law raised or reserved.

He had, therefore, applied to Mr. Justice Mein, at Chambers, and obtained the order *nisi*.

Sir S. W. Griffith, Q.C., Real with him, appeared on behalf of the appellant to move the rule absolute; *Power, Lilley* with him, appeared to show cause.

Sir S. W. Griffith: When the case came on before the District Court Judge, the documents required by section 73 of *The Gold Fields Act* were produced; the only objection being that the proceedings were not commenced by a regular plaint, headed "In the Warden's Court, &c.," according to the form in the rules. The appellant contended that the proceedings were taken under section 47 of the Act,—"upon oral or written complaint of any party and with the consent of both parties." There had been no objection by respondent to the hearing by the Warden. Appellant was entitled to the rule absolute.

Power: The appeal was under section 73; and the judge was bound to refuse to hear it. It did not appear to him that the proceedings were brought under section 47. The latter section was intended only for dealing summarily with matters which could not come to appeal.

The judgment of the Court was delivered by

LILLEY, C.J.: In this case the dispute as to a claim was heard before the Warden. It appears that the party complaining wrote a letter to the Warden, and then the Warden's clerk issued a letter to the parties, summoning them to come before the Warden to settle the matter of the complaint. Under section 47 of *The Gold Fields Act of 1874*, there is clearly jurisdiction by consent of parties for the Warden, either on oral or written complaint, to hear the subject matter of a dispute. That section says:—

It shall * * * be lawful for the Warden upon oral or written complaint of any party and with the consent of both parties immediately on the making of such complaint or at any time agreed on by the parties and at any place within the goldfield to investigate the matter of such complaint and to inquire into the case and on his own view or the oath of any witness to determine the same in a summary way and thereupon to exercise all and every the powers and authorities vested in him in the same manner in every respect as if the cause had been heard upon plaint and notice of defence in the usual way.

Then the section further requires by proviso that:

The Warden shall in every case make an entry of the grounds of the complaint and defence or cross-relief and of the decision.

Now the proceeding under this section is that the parties, on either oral or written complaint, by consent, go before the Warden; then the Warden makes a written entry of the complaint, and of defence or cross-relief, and of the grounds of complaint; also an entry of his decision. There is then a complete record in writing made by the Warden himself, on the hearing between the parties. What is the consent under that? It may be in writing; it may be *vivâ voce* before the Warden; or it may be justly implied from the acts or conduct of the parties. If two men go before the Warden and submit a matter in dispute to him, are heard on both sides and submit to his decision, it does not come well from the party against whom the decision is made, after the whole hearing, to object that it was not a proper hearing, and that the whole hearing is bad. It seems to me that there was a hearing by consent before the Warden here. Well, then, where the decision of the Warden is not final, there is a right of appeal under section 71, which is as follows:—

Any person who shall be desirous of appealing from the decision of a Warden upon any hearing of a case before him or before him and assessors in cases where such decision is not hereby declared to be final may appeal from the same to the District Court which shall be held at or nearest to the goldfield.

An appeal was made here. On the judge being about to hear the case, a preliminary objection appears to have been taken under section 73:—

No such appeal shall be heard unless at the hearing of such appeal a copy of the plaint and notice of defence and of the minute of such decision and of the order thereon signed and certified under the hand of the Warden or his clerk shall be produced to such Court and the Warden is hereby required to lodge or cause to be lodged such copy.

The judge appears to have reserved his decision until the close of the case. Now it appears that there were before the District Court a copy of the entry of the grounds of complaint, of the defence or cross-relief, and of the decision, under section 47. That material was before the District Court judge. It does not matter whether the parties considered that they were proceeding under section 47 or section 78. The former gives the Warden sufficient jurisdiction, while the latter does not affect the parties, but is a convenience for the judge. I think upon the most natural construction of the statute, that this is matter of procedure under section 73, not affecting the jurisdiction, and that, there was really before the District Court judge a written copy of the plaint, and of the defence, and of the minute of the decision, and of the order thereon; so that not only the letter but the spirit of section 73 was complied with. I think the judge was bound to hear the appeal. As to the question of costs,—the party taking this objection was the party in fact whose objection appears to me to have misled the judge. So far as I am concerned I think the rule must be made absolute in the terms asked for, with costs.

HARDING, J., and MEIN, J., concurred.

Solicitors for appellant: *Daly and Hellicar*, agents for *Marsland and Marsland*, Charters Towers.

Solicitors for respondent: *Bunton and Little*, agents for *Jarvis and Turner*, Charters Towers.

PERKINS *v.* REGISTRAR OF TITLES. 4 Q.L.J. 70

The Real Property Act of 1861 (25 Vict., No. 14), and The Real Property Act of 1877 (41 Vict., No. 18)—Transfer, registration of—Judgment, endorsement of on transfer.

Where a judgment is entered on the register against certain land, it is the duty of the Registrar to refuse to register a transfer of the certificate of title for the said land unless the judgment is endorsed on the transfer. *McGlone's case* (2 Q.L.J., 182), followed.

APPLICATION had been made in August, 1877, by applicant to the Registrar of Titles, to register a transfer to him of certain lands, and to issue certificate of his title as transferee, subject to the endorsement of a mortgage already entered on the register, but not subject to a judgment also entered on the register on 29th April, 1887, recovered in this Court by the South Australian

Land Mortgage & Agency Company, who now appeared. Applicant had claimed that the entry of a judgment did not affect his right to be registered under *The Real Property Acts;* and the Registrar refused to register the transfer without endorsing the judgment as well as the mortgages upon it.

Real, Lilley with him, appeared on behalf of the applicant, T. H. Perkins; *Rutledge, A.G., Wilson* with him, for the Registrar of Titles; and *Sir S. W. Griffith, Q.C., Feez* with him, for the South Australian Land Mortgage & Agency Company, Limited.

Real for applicant: Entry merely of a judgment on the register did not affect title. Registration of an execution gave a valid title, as good as registration of a certificate of title. Registration of a judgment gave no legal standing whatever. By section 91 of *The Real Property Act*, a judgment had no validity until registered; but until execution, a title to land was unaffected by it. In section 45 of *The Common Law Practice Act*—a re-enactment of *The Registration Act*, which was in force when *The Real Property Act* was passed—said that, "no judgment shall bind or affect land, but a writ of execution shall when delivered to the sheriff." Section 91 of *The Real Property Act* limited the period for execution of a judgment to three months. This was therefore an expired judgment, or nothing at all. The Registrar had decided not to put the application on the register book, unless he himself put the judgment on his transfer. He could not come to this Court and ask for the removal of the judgment, if he himself had put it on his transfer. Section 91 had not the effect of altering the law. *Pitman v. Maddox*, 2 Salk., 689. A judgment did not create a charge.

Rutledge, A.G.: The Registrar of Titles was bound by the decision of the Court in *McGlone's Case*, 2 Q.L.J., 182, and in *The Mutual Assurance Society of Victoria v. The Registrar-General*, 1 Q.L.J., 177. As to section 91, there was no more authority for entering an execution as binding upon land than there was for entry of a judgment. By it a judgment was binding on land. Section 45 of *The Common Law Practice Act*, did not affect land under *Real Property Acts*, only land which has not been brought under their provisions.

LILLEY, C.J.: We think we are bound by *McGlone's Case.* You must take the register as it is; but you can apply to the Registrar to remove the entry of the judgment from the register.

Real: After we put it on?

LILLEY, C.J.: Yes, certainly. If the Registrar says No, then you can come here. He is bound to require you to bring your transfer and certificate of title into agreement with the register. He has no power to decide priority; he has no judicial power. The rule is discharged with costs.

Solicitors for applicant: *Hart & Flower.*

Solicitor for the Registrar of Titles: *Gill, Crown Solicitor.*

Solicitors for judgment creditors: *Macpherson, Miskin & Feez.*

PINNOCK AND OTHERS *v.* WEBB AND OTHERS.

Will—Distribution—Class, mode of ascertaining.

The testator devised certain property to trustees upon trust, to let and demise the same until the eldest of the daughters of his son E. or of his daughter F., who should be living at the time of his decease, should attain the age of 21 years or marry (which should happen first), and after such coming of age or marriage, upon further trust to sell the same, and to divide the moneys arising from the sale into as many equal parts as there should then be daughters surviving of his said son E. and of his said daughter F., and to pay such parts into the hands of his said granddaughters as they came of age or married.

At the time of the testator's death his said son E. had one daughter living, and his daughter F. had three daughters living, the eldest of whom came of age on the 14th day of August, 1882, and was the eldest granddaughter.

After the death of the testator, and before the said 14th day of August, 1882, his said son E. had issue four more daughters.

Held, that, the period of distribution was at the term of survivorship, and that the eldest granddaughter's arriving of age was the period of ascertaining the class.

THIS was a special case stated by consent of parties for the opinion of the Court, as follows:—

Special case stated by consent for the opinion of the Court, pursuant to the Rules of the Supreme Court Order XXXIV.

1. George Dudley Webb late of Brisbane Esquire deceased duly made his will dated the 12th day of July 1867 and thereby gave and devised unto Charles Coxen and the defendant Ernest Hervey Webb and their heirs all that piece or parcel of land containing one acre and a half or thereabouts situated on the Breakfast Creek Road near Brisbane aforesaid known as "Cintra" upon trust to let and demise the same upon such terms as they should see fit until the eldest of the daughters of his son Edward and his daughter Fanny the wife of George B. Newman who should be living at the time of his decease should attain the age of 21 years or marry (which should happen first) and from and after such coming of age or marriage upon further trust to sell and absolutely dispose of the same upon such terms and conditions in all respects as they might see fit And the testator declared that his said trustees should stand possessed of the moneys to arise from such leasing or sale as aforesaid upon trust to divide the same into as many equal parts as there should then be daughters surviving of his said son Edward and daughter Fanny and pay one of such parts into the hands of the daughter who should have so come of age or married as aforesaid and should stand possessed of one of such remaining shares upon trust for each of the other daughters of his said son and daughter to be by her respectively received upon the coming of age or marrying and in the meantime to be invested as therein mentioned And the testator declared that if there should be but one daughter surviving of his said son and daughter then the said moneys should be held in trust for such only daughter to be paid to her on coming of age or marrying And the testator declared that the share of every female under his will should be by her received free from marital control and her receipt for the same should alone be to the trustees and executors of his will a sufficient discharge And the testator appointed the said Charles Coxen and the defendant Ernest Hervey Webb trustees and executors of his will and empowered his said trustees to give effectual discharges of all moneys paid to them as such trustees.

2. The testator made a codicil dated the 5th day of September 1870 to his said will and thereby revoked the appointment of the said Charles Coxen as one of his trustees and executors and appointed the defendant Daniel Foley Roberts a trustee and executor in his stead jointly with the defendant Ernest Hervey Webb and in all other respects the testator ratified confirmed and revived his said will.

3. The testator died on the 11th day of September 1870 without having revoked his said will and codicil which were duly proved on the 13th day of October 1870 by the defendants Ernest Hervey Webb and Daniel Foley Roberts.

4. At the date of the said testator's death his said son Edward had one daughter living and no more namely the plaintiff Kate Ethel Pinnock (then Kate Ethel Webb) who was born on the 24th day of March 1862 and the testator's said daughter Fanny had three daughters living and no more namely the plaintiff Eleanor Jane Newman who was born on the 14th day of August 1861 the plaintiff Ann Isabella Newman who was born on the 17th day of October 1859 and the defendant Barbara Maud Newman who was born on the 5th day of September 1865.

5. The plaintiff Eleanor Jane Newman the eldest of the testator's said granddaughters so living at the date of his death as aforesaid attained the age of 21 years on the 14th day of August 1882 without ever having been married.

6. After the death of the testator but prior to the said 14th day of August 1882 the testator's said son Edward had issue four daughters and no more namely the defendant Leila Jesse Webb who was born on the 10th day of November 1873 the defendant Ilma Barclay Webb who was born on the 17th day of October 1875 the defendant Mabel Beatrice Webb who was born on the 15th day of December 1877 and the defendant Brenda Maud Webb who was born on the 6th day of March 1880.

7. After the death of the testator the defendants Ernest Hervey Webb and Daniel Foley Roberts let the said land known as "Cintra" so devised by the said will as aforesaid and entered into receipt of the rent thereof in accordance with the trusts in that behalf in the said will contained concerning the same until the date next hereinafter mentioned.

8. In the month of September 1882 the defendants Ernest Hervey Webb and Daniel Foley Roberts sold and absolutely disposed of the said land known as "Cintra" and received the purchase money for the same and have since paid into the hands of each of the plaintiffs Kate Ethel Pinnock Eleanor Jane Newman and Ann Isabella Newman respectively one equal eighth part of the moneys arising from such leasing and sale as aforesaid.

9. The plaintiffs submit that under the trusts hereinbefore mentioned of the said will the plaintiffs Kate Ethel Pinnock Eleanor Jane Newman and Ann Isabella Newman together with the defendant Barbara Maud Newman are each of them respectfully entitled to one equal fourth part of the moneys arising from such leasing and sale as aforesaid.

10. On behalf of the infant defendants it is contended that under the true construction of the said will they together with the plaintiffs Kate Ethel Pinnock Eleanor Jane Newman and Ann Isabella Newman and the defendant Barbara Maud Newman are each of them respectively entitled to one equal eighth part of the moneys arising from such leasing and sale as aforesaid.

The questions submitted for the opinion of the Court are:—

(a) Whether under the circumstances hereinbefore appearing the class of the testator's granddaughters entitled under the trusts in the said will declared concerning the said land known as "Cintra" is to be ascertained (1) at the date of the testator's death (2) or at the date of the

coming of age of the plaintiff Eleanor Jane Newman (3) or at what other date?

(b) By whom and out of what funds the costs of this case ought to be paid?

Real appeared on behalf of the plaintiffs; and *Lilley* on behalf of the defendants.

Real stated the facts, and cited the following cases:—*Doe Dem Long v. Prigg*, 8 B. & C., 231; *Stringer v. Phillips*, 1 Eq. Ca. Abr., 293. The question was simply, whether at the coming of age of the eldest granddaughter, or at the death of the testator, the class of his granddaughters was to be ascertained?

Lilley: It was a division into eight shares. The time of distribution was the time of ascertaining the class. Cited *Cripps v. Woolcock*, 4 Madd., 11; *Vorley v. Richardson*, 8 DeG.M. & G., 126; and *In re Hunter's Trusts.*

HARDING, J., referred to *Hawkins on Construction of Wills*, p. 265. So far, I am with you.

LILLEY, C.J., and MEIN, J., concurred.

LILLEY, C.J.; The Court is unanimous. The period of distribution is at the term of survivorship. They would all be entitled at the coming of age of the eldest granddaughter. Our answer to the first question is, No; to the second, Yes. The eldest granddaughter's arriving of age is the period of ascertaining the class; the division will be in eighths. Allow costs out of the fund, to be paid by the trustees.

Solicitors for plaintiffs: *Hart & Flower.*

Solicitors for defendants: *Roberts & Roberts.*

NOVEMBER SITTING OF THE FULL COURT.

In the matter of AN APPLICATION OF JOHAN FREDERIC HUMMEL, MASTER MARINER, FOR A WRIT OF PROHIBITION AGAINST THE MARINE BOARD OF QUEENSLAND.

The Navigation Act of 1876 (31 Vict., No. 3), Secs. 37, 38 and 39—Certificate, cancellation of—Marine Board, power of.

The applicant, who was master of the barque "Wistaria," was summoned by the Marine Board to an enquiry *re* the stranding of the said barque "Wistaria." He thereupon attended and gave evidence, and afterwards the Board, without giving him any notice that his conduct as master was to be the subject of enquiry, cancelled his certificate.

Held, that before a man can suffer penal or other consequences, he must have a specific charge brought against him, and that the proceedings should have been commenced under section 37 of *The Navigation Act.*

MOTION to make absolute a rule *nisi*, granted by The Chief Justice on the 12th October, on the application of J. F. Hummel, calling on the Marine Board of Queensland to show cause why a writ of prohibition should not issue to prohibit them from proceeding, in respect of their decision of 30th September, in an inquiry held by them into the stranding of the barque "Wistaria," while under applicant's command, on the reef off One Tree Island, Bunker Group; by which decision they directed that applicant's certificate as master mariner, foreign going, No. 28,840, should be cancelled.

The Board had, on the 24th September, by letter, requested Hummel's attendance at a meeting of their body to be held on the 26th, which letter concluded with the words—"Business, *re* enquiry stranding barque 'Wistaria.'" Such enquiry was duly held, and Hummel attended it and gave evidence of the circumstances of the stranding of his vessel. He received no intimation of the Board's intention to deal with his certificate, and prior to its cancellation he did not receive a report or statement of the case upon which the investigation was held. Hummel, in his affidavit in support of the application for the rule *nisi*, further swore that he had no knowledge that his conduct as master was to be the subject of enquiry, and that he had no opportunity of preparing or making a defence, or showing cause why his certificate should not be cancelled.

The ground for cancelling the certificate was that, on account of his age, the applicant seemed unable to understand the sailing directions.

Lilley applied for the rule *nisi*, which was made returnable at the November sitting of the Court. The grounds on which it was granted were:—

(1.) That the Board did not furnish applicant with a report or statement of the case previous to the enquiry;

(2.) That the cancellation of his certificate was not the subject matter of the enquiry;

(3.) That applicant had no opportunity of making his defence, and

(4.) That the Board had no jurisdiction at that enquiry to cancel applicant's certificate.

At this sitting of the Court, *Real*, *Lilley* with him, appeared for the applicant; and *Wilson* for the Board, to show cause.

Real moved the rule absolute; and referred to *The Navigation Act (31 Vict., No. 3)*, section 39, subsection 3; *The Merchant Shipping Act of 1876*, section 30; *Pritchard's Admiralty Digest*, 3rd edition, p. 2237; *Ex parte Dykes*, 3 Vic. L.R., 162; and *Ex parte Allen*, 7 Vic. L.R., 248.

Wilson, for the Board, opposed. The enquiry was under section 37 of *The Navigation Act*. Referred to sections 37, 38 and 39; and to *Ex parte Ferguson*, L.R., 6 Q.B., 280, at 287.

LILLEY, C.J.: It is a principle of natural justice, that before a man can suffer penal or other consequences, he must have a specific charge brought against him. There was here no specific charge, but a different matter—an enquiry into the stranding of the "Wistaria." To found the jurisdiction of any court, there must be a specific charge. To my mind, there was no jurisdiction here because the Board had no charge before them. This enquiry is like a trial and verdict in this Court without a writ of summons issued. On all the grounds I think the rule should go.

HARDING, J.: I also think this rule must be made absolute. The notice that was given to the master appears to have been for an enquiry into the stranding of the barque "Wistaria." From that alone, without looking at the sections of the *Navigation Act*, it seems quite clear that at the commencement of the proceedings, if there was jurisdiction, he was not called on to defend himself; and the principle is clear that a person must have a full and ample opportunity of defending himself on any charge. That appears not to have been done in this case; and, without the statute, I should hold that the rule must be made absolute. Then, on investigating the statute, and seeing if the principles of the law of natural justice have been altered, it appears that the proceedings should have been commenced under section 37. In that section three classes of cases are given, in the first of which is specifically mentioned stranding. The second is another class; and the third—

> When complaint has been made to the board or the board have reason to believe that any master * * * * is incompetent to discharge his duties or has committed any act of misconduct * * *

actually meets this particular case. In view of this, and adopting the maxim, *expressio unius est exclusio alterius*, the master in being called on to attend the enquiry into the stranding of the "Wistaria" was warned off, so to speak, from the other case. He was charged with stranding, and nothing else. Then again—

> When the conduct of any master mate or engineer is under investigation full opportunity shall be given him of making a defence either in person or otherwise.

E converso, when his conduct is not under investigation, there is no necessity for him to make a defence. In other words, an investigation is not to be extended from any supposed necessity, to make the master liable, at the end of such investigation, to answer a charge that he is incompetent. Then, again, in every case of enquiry as to conduct, the master must be there to defend himself. Section 38 provides as to the cancellation or suspension of a certificate in the following cases—

> (1) If upon any investigation made in pursuance of the last preceding section he is found to be incompetent or to have been guilty of drunkenness or tyranny or any gross act of misconduct or negligence;
>
> (2) If it is shown that the loss or abandonment of or serious damage to any vessel has been caused by his wrongful act or default;

and (3) if the holder of a certificate under the Act is shown to have been convicted of any offence. But in this case the jurisdiction to cancel the

certificate for incompetency never arose. This view is further borne out by section 39, where it is provided that when the conduct of the master is in question—

no certificate shall be cancelled or suspended unless a copy of the report or a statement of the case upon which the investigation is to be held has been furnished to the owner of the certificate before the commencement of the investigation.

All these sections go, to my mind, to clearly show that the law of natural justice must be followed under this statute as well as in all other cases in which courts exercise jurisdiction. I think the rule must be made absolute.

MEIN, J.: I also think that this rule should be made absolute with costs. It appears to me to be contrary to the principles of natural justice that a man should be found guilty, and suffer punishment for misconduct with which he has not been specifically charged, and in respect of which he has not had an opportunity of defending himself on a formal trial or enquiry. Section 37 of *The Navigation Act* enumerates three classes of subjects in regard to which the Marine Board are entitled to hold investigations. The third of these comprises investigations to be held, either on the complaint of a third person, or when the Board themselves are of opinion that a master is incompetent to discharge his duties, or has committed any act of misconduct for which his certificate of competency is liable to be cancelled or suspended. A subsequent part of the same section provides that, when the conduct of a master is under investigation, full opportunity shall be given him of making a defence. The 38th section specifies the cases in which certificates of competency may be cancelled or suspended; and the 39th section, to which my brother Harding has referred, lays down the rules which must be observed with respect to such cancellation or suspension. Each of these rules treats the holding of an investigatiou as a matter of course; and the third rule distinctly prescribes that no certificate shall be cancelled or suspended unless a copy of the report, or a statement of the case upon which the investigation is to be held, has been furnished to the owner of the certificate before the commencement of the investigation. The only reasonable deduction to be drawn from these provisions is, that in all cases when a master is charged with incompetency or misconduct rendering him liable to the cancellation or suspension of his certificate, a copy of the charges must be furnished to him, and he must also have an opportunity of clearing himself from the charges at a regularly conducted investigation. That was not done in the present case; and the decision of the Board, therefore, cannot stand.

Solicitors for applicant: *Hart & Flower.*

Solicitor for Board: *Gill, Crown Solicitor.*

MAXWELL *v.* LAWSON.

Ship and Shipping—Duty of Master as to Goods damaged by negligent stowage—Bill of Lading, exception in—Exception not arising clearly from the terms of the contract so as to bind shipper.

The defendant, who was the master of the ship "Cloncurry," received on board the said ship one case of plate glass to be carried and delivered at Brisbane, on the terms of three bills of lading. In consequence of improper stowage, the case was bent, and the glass damaged, broken, and destroyed. The plaintiff, who was the consignee of the said goods, brought an action against the defendant for the value of the glass.

The defendant relied upon the terms of the following exception in the bills of lading to exonerate him from liability, viz.:—"any act neglect or default whatsoever of pilots master or crew or other servant of the company."

Held,

(1) That the contract to carry safely is not subject to a condition that the defendant shall not be responsible for a personal breach of duty.

(2) That by the maritime law the master is a party to the bill of lading, and may be sued for a breach of it without joining the ship-owner.

(3) That it was the duty of the master, having charge of the goods under contract for the joint benefit of the ship-owner and shipper, to take care of and preserve them as bailee.

(4) That the master, having undertaken the duty of carrying the goods, cannot shield himself from the consequences of a personal breach of duty, or from personal negligence, by the exception "any act neglect or default of the master" in the bill of lading.

(5) That, if such an exemption is claimed, it must be shown to arise clearly from the terms of the contract.

(6) That the defendant had failed to establish the exemption he claimed.

HARDING, J., dissented.

THIS was a question of law raised by the pleadings, and referred before trial to the Full Court.

The pleadings were as follow:—

Amended statement of claim amended the 4th day of November 1886.

1. The plaintiff is a painter and glazier carrying on business in Brisbane in the Colony of Queensland The defendant is and was at all the times hereinafter mentioned the master of the steamship "Cloncurry."

2. On the 8th day of June 1886 Messieurs Pilkington Brothers of Liverpool delivered to the defendant and the defendant received from the said Messieurs Pilkington Brothers one case of plate glass to be by the defendant shipped or stowed on board the said steamship "Cloncurry" then lying in the port of Liverpool in England and carried from Liverpool aforesaid to Brisbane aforesaid upon the terms of three bills of lading signed by the defendant and delivered to the said Messieurs Pilkington Brothers and upon the further terms that the defendant should use due and proper care in and about the stowage of the said case of plate glass.

3. The three bills of lading being in form exactly similar to one another were and are so far as is material to be herein stated in the words and figures following that is to say:—

"Shipped in good order and condition by Pilkington "Brothers on board the steamship 'Cloncurry' whereof is "master for this present voyage ——— lying in the port of "Liverpool and bound for Brisbane one case of plate glass "and being marked and numbered as per margin and to be "delivered subject to the exceptions and conditions herein-"after mentioned" (but not necessary to be herein stated) "in the like good order and condition from the ship's "tackles at the port of Brisbane or so near thereto as she "may safely get unto order or his or their assigns Freight "for the said goods at and after the rate of ——— per ton "to be paid in Liverpool by the shippers Ship lost or not "lost average accustomed In witness whereof the master "or agent of the said ship has signed three bills of lading "exclusive of the master's copy all of this tenor and date "one of which being accomplished the others to stand void."

"Dated at Liverpool the eighth day of June 1886."

4. The said goods were stowed in the said vessel by the defendant and in accordance with his directions.

5. The said vessel sailed on her voyage to Brisbane and duly arrived there on the 15th day of August 1886.

6. The said bills of lading were duly endorsed to the plaintiff by the said Messieurs Pilkington Brothers to whom upon and by reason of such endorsement the property in the said goods passed and all rights of action were transferred to and became vested in him.

7. The defendant did not use due and proper care in the stowage of the said case of plate glass but so negligently stowed the same that the said case was bent and the said glass damaged broken and utterly destroyed after the same was shipped and stowed on the said vessel as aforesaid.

8. The said damage to the said goods was not caused by any of the exceptions perils or casualties mentioned in the said bills of lading but was caused by the negligence of the defendant in not using due and proper care in the stowage of the same as aforesaid and not otherwise and by reason thereof the same were wholly lost to the plaintiff.

The plaintiff claims:—

1. £190 17s. 5d. damages.

2. Such further and other relief as the nature of this case may require.

Amended statement of defence amended the 23rd day of July 1887.

1. The defendant says that by the bill of lading in paragraphs three and five of the claim mentioned it was provided that the goods in paragraph two of the claim mentioned should be delivered subject to the exceptions and conditions in the said bill of lading mentioned of which the following exceptions and conditions formed part:—

"The act of God The Queen's enemies pirates robbers "by land or sea restraint of princes rulers or people "collisions stranding jettison barratry loss or damage "arising from accidents to or defects latent or otherwise in "hull tackle boilers or machinery or their appurtenances "steam or bursting or leakage of pipes or from explosion "heat or fire on board in hulk or craft or on shore any act "neglect or default whatsoever of pilots master or crew or "other servants of the company the dangers and accidents "of the seas rivers and canal and of navigation of what-"soever nature or kind are excepted."

"The ship is not liable for insufficient packing torn or "chafed wrappers or reasonable wear and tear of packages "for inaccuracies obliterations or absence of marks counter-"marks numbers or addresses leakage breakage sweating "wastage evaporation rust or decay damage by vermin or "contact with other goods effects of climate or heat of "holds or by the dust from coaling or for the condition of "re-exported or repacked goods."

2. The defendant denies he refused to deliver the said goods to the plaintiff or that the said goods or any part thereof were or was lost to the plaintiff in consequence of the defendant's alleged non-delivery and the defendant says that he did deliver the said goods to the plaintiff and the plaintiff received the same.

3. The defendant further says that the loss (if any) incurred by the plaintiff in respect of the said goods was occasioned through insufficient packing of the said goods within the meaning of the exceptions and conditions aforesaid and not otherwise.

4. The defendant further says that the loss (if any) incurred by the plaintiff in respect of the said goods was occasioned through breakage of the said goods within the meaning of the exceptions and conditions aforesaid and not otherwise.

5. Except as hereinafter appearing the defendant denies

that the said goods were shipped upon the terms that he should use due and proper or any care in or about the stowage of the said case.

6. The defendant says that the said goods were stowed in the said vessel by the servants of the owners of the said vessel in the said bill of lading called the said company. Except as aforesaid the defendant denies that the said goods were stowed in the said vessel by him or in accordance with his directions.

7. The defendant says that due and proper care was used in the stowage of the said goods and he denies that he or the persons who stowed the same did so negligently or that through any such negligence the said case was bent or the said glass damaged or broken or utterly or at all destroyed after the same was shipped or stowed in the said vessel.

8. The defendant denies the allegations in the eighth paragraph of the amended statement of claim.

9. The defendant does not admit the allegations in the sixth paragraph of the amended statement of claim.

The question to be decided was, whether the exception in the bills of lading,—"any act neglect or default whatsoever of pilots master or crew or other servants of the company,"—protected the master, as well as the owners, from liability for his personal negligence in the stowage of goods?

Real, *Lilley* with him, appeared for the plaintiff; and *Sir S. W. Griffith*, *Q.C.*, *Power* with him, for the defendant.

Sir S. W. Griffith, *Q.C.*, began by consent: As there were bills of lading, the question of liability for stowage was one merely of breach of the contract, contained in the bills of lading. The damage here was not within that contract. The defendant had contracted himself outside of the ordinary duty of and consequent liability for negligence: *Smith's Mercantile Law*, 9th ed., 304; *Blakie v. Stembridge*, 28 L.J., C.P., 330, and, on appeal, 29 L.J., C.P., 212. The exception in the bills of lading was not sufficient to relieve defendant from breakage by his own negligence: *Steele v. State Line Steamship Co.*, L.R., 3 App. Ca., 72, per Blackburn, L.J. This case was similar to *The Duero*, L.R., 2 A. & E., 393. The bill of lading was the expression of the true contract between the parties.: *Ivey v. Queensland Steam Shipping Co.*, 2 Q.L.J., 188, at 189. It was necessary here to show that some act other than an ordinary omission would render the master liable for damages: *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, L.R., 10 Q.B.D., 521, at 521, 531 and 539. That was not shown here. The master was relieved from everything except a positive wrongful act on his part. Under the bill of lading the liability of the agent was the same as that of the principal. Otherwise the master was here more liable than his principal; and such liability must arise outside the contract.

Real for plaintiff: *Blakie v. Stembridge*, which was also reported in 6 Q.B., N.S., 894, and 5 Jur., N.S., 1130, drew the distinction between the two classes of liability, which the master had in common with his owners, and also both to his owners and to the shippers. He was not in the ordinary position of an agent. Here there was no contract against his personal liability. Referred to 28 L.J., C.P., pp. 331 and 332. Without the exception in the bills of lading, the master was liable for his own negligence and for the negligence of the crew: 5 Jur., N.S., 1130. A man could not contract himself out of his liability for his own personal negligence, *Hayn v. Culliford*, L.R., 3 C.P.D., 410, and on appeal 4 C.P.D., 182. The pleading here was sufficient to charge either in contract or tort; it would sound in either. If he had the power to contract himself out of the liability, the words here were not sufficient, and no case had gone so far as to say he could contract himself out of his personal liability; *Lea v. Howard Smith & Sons*, 1 Q.L.J., 157; *Ivey v. Q. S. S. Co.*; *Phillips v. Clark*, 2 C.B., N.S., 156; *Czech v. General Steam Navigation Company*, L.R., 3 C.P., 14; and *Crooks v. Allen*, L.R., 5 Q.B.D., 38. The exception must be clearly stated: *Burton v. English*, L.R., 12 Q.B.D., 218, per Bowen, J., at 222. The bills of lading here only protected the master's acts considered as a servant of the company; the contract only protected the principals from the acts of their subordinates, not the subordinates from the consequences of their own personal negligence.

Lilley followed: If the master was negligent, it did not matter that he was not wilfully so: *Brown on Carriers*, p. 498. He was not

regarded as a mere servant: *Abbott on Shipping*, 10th ed., p. 259; *Goff v. Clinkard*, cited 1 Wils., 282; *Scrutton on Affreightment*, p. 169. The master was here trying, as agent, to shelter himself under a contract in favor of his principal, which excepted his owners from the liability for his negligence. But he was not sued as agent; but on his own personal liability.

Power in reply: "The master" was exempted; and had contracted himself out of all negligence.

C. A. V.

On the 10th November, 1887, their Honors delivered the following judgments:—

LILLEY, C.J.: I think that the contract to carry safely is not subject to a condition that the defendant shall not be responsible for a personal breach of that duty. This is an action against the master of the ship "Cloncurry" for negligent stowage of glass, and for damage resulting therefrom, on a voyage from Liverpool to Brisbane. The question of law raised by the pleadings has been referred to us, by an order of Mr. Justice Harding, for our decision. The statement of claim alleges that the defendant received the goods on board the ship at Liverpool to be carried and delivered at Brisbane, "and upon the further terms that he should use due and proper care in and about the stowage of the glass;" that the goods "were stowed in the vessel by the defendant and in accordance with his directions;" that the defendant "did not use due and proper care in the stowage of the glass;" that the glass "was damaged broken and destroyed;" and that "the damage was not caused by any of the exceptions" in the bills of lading, "but was caused by the negligence of the defendant in not using due and proper care in the stowage of the same." The defendant relies upon the terms of the exceptions in the bills of lading to exonerate him from liability. By that instrument the goods are "to be delivered subject to the exceptions and conditions hereinafter mentioned * * * * the ship's responsibility commencing when the goods are over the ship's deck, level with the rail, and ceasing, when delivering, when the goods are over the ship's side, level with the rail." The duty of stowage was clearly not excepted, but the exceptions which follow are so numerous that it may be fairly said the owners endeavoured to relieve themselves from all responsibility as carriers. The question of law which is raised for our decision is whether the master is discharged from liability for negligence in stowing the goods by force of the words in the exception "(2) any act neglect or default whatsoever of pilots master or crew or other servants of the company;" whether upon a true construction these words protect not only the owners but the master from the consequences of his personal negligence. These bills of lading, like all others, are inartificially drawn. They are not formal instruments prepared by lawyers in which a contracting party describes himself as "the party hereinafter called the vendor" or "the master," and thenceforth speaks of himself in the third person. We must give these documents the meaning which their words would ordinarily and naturally bear unless they have received some technical interpretation by usage among business men, or from the decisions of the courts of law. It does not appear that they bear any specific technical meaning. The words in these bills of lading excepting the contracting party from liability for "any act neglect or default whatsoever of master" would be natural and ordinary language if used by the owner with respect to his responsibility for the acts of his servants. They would be fitly the words of one speaking of a third person, and not of a master speaking for himself. To these bills of lading there are more parties than one, whose duties, undertakings, and liabilities may be several, and their engagements may be different. The master is not a mere agent of the owner. By the maritime law he is a party to the contract in the bill of lading, and may be sued for a breach of it without joining the shipowner. When he has taken charge of the ship and cargo, he has a duty not merely to his employer, the owner of the ship, but also to the shipper of the goods. He has "the charge of the goods under contract for the joint benefit of the shipowner and shipper, and falls within the class of persons who

are under obligation to take care of and preserve the goods as bailees." Again, "Can it be said that this duty of taking care of the cargo is other than a duty to take reasonable care of the cargo for the benefit of all who are concerned in the adventure?" "That a duty to take care of the goods generally exists cannot be doubted," and "the duty exists in law;" *Notara v. Henderson*, L.R., 7 Q.B., 225. Could the master reasonably suppose that the words "any act neglect or default of master" were intended to shield him from the consequences of a personal breach of duty, or from personal negligence? I think not; and if it is even doubtful, he is not entitled to the benefit of a construction of the words which would relieve him from the obligation of a duty which he had undertaken to perform by the bill of lading to which the words are alleged to establish an exception. By the contract he undertakes a duty, and by the alleged exception he is supposed to say he is not to be responsible, if by any act, neglect, or default he does not perform it. Could the shipper suppose that the words freed the master from the legal obligation of his employment to take due care of the goods? I think not. The Courts do not favour such exemptions. If they are claimed, they must be shown to arise clearly from the express terms of the contract. Bowen, L.J., says, in *Burton v. English*, "What is the sound principle to apply? Why, it is that they who wish to make exceptions in their own favour, and by which they are to be relieved from the ordinary laws of the sea, ought to do so in clear words." L.R., 12 Q.B.D. 224.

The master is the party to the contract who has the command of the ship, and of the crew, and the control of the whole adventure, and as he claims exemption from duty he must make it clear. The language of the exception seems to show that it was intended for the relief of the shipowner, who would otherwise be liable for the master's acts. It would be an unreasonable construction to hold that it relieved the master from liability for his own personal negligence.

The owner would by the terms of the exception be freed from all liability for the master's "acts neglects or defaults," whatever might be the character of the breach of duty, and whether it involved criminal or civil responsibility. It cannot be held that those words would relieve the master from ultimate liability to the shipper if the loss arose from a criminal act, or a deliberate tort, or culpable negligence. If the exemption will not bear an equal interpretation in respect of the master and shipowner alike—if we must engraft an exception on the exception to make it fit the master—then it seems obvious that it could not be intended to apply to the master, or has not been so expressed, which leads to the same result. The master has failed to establish the exemption he claims in his defence. My judgment, therefore, is for the plaintiff.

HARDING, J.: In this case, Samuel Maxwell, the endorsee of the bills of lading of a case of plate-glass, sues the defendant, W. R. Lawson, as master of the steamship "Cloncurry," on board which the same was stowed, and by whom the bills of lading were signed, for negligently stowing the same, whereby the plate-glass was broken and damaged. The statement of claim states other facts, which I shall refer to later, but on this short statement of the plaintiff's case it is clear that with respect to these goods it was Lawson's duty, on the part of the shipowner, to receive and properly stow them on board, so that they should not be injured either by being taken on board or by the motion of the ship, and in case of damage to the goods occasioned by negligence in performance of such duty, it is clear Lawson and the shipowners are liable to the plaintiff, and Lawson to the shipowners, if the damage results from his misconduct. This being the law, the plaintiff, when he states, as he does, the original delivery of the goods to the defendant, and his receipt of them to be shipped, stowed, and carried upon the terms of the bills of lading, adds nothing but the conclusion of law which arises upon the facts when he states that such delivery and receipt was upon the further terms that the defendant should use due and proper care in and about the stowage of

the said case of plate-glass. The plaintiff having thus pleaded the law applicable to the case, charges damage to the goods by the defendant's negligent stowage, and goes out of his way to allege that the damage was not caused by any of the exceptions mentioned in the bill of lading (it would be strange if it had been), but was caused by the defendant's negligence. The defendant sets up the exceptions in the bills of lading as a defence. He says that his liability is covered by the exception in the bills of lading, which is shortly as follows:—"2. * * any act, neglect, or default whatsoever of pilots, master, or crew, or other servants of the company." The case comes up upon an order that the question of law raised by the pleadings be tried on the pleadings and production of the bills of lading, before the questions of fact. I do not find it necessary to further state the facts. The master is clearly liable unless he is covered by the exceptions. He contracts on his own behalf as well as for the owner, and is in some sort a subrogated principal and qualified owner of the ship, and his liability founded upon this consideration extends not only to his contracts, but to his own negligences and nonfeasances and misfeasances. The facts stated in this statement of claim would make an equally good case against the owner, unless he has contracted himself out of it by the exceptions in the bills of lading I have above referred to —because they are both liable to the shipper for negligence of this kind. By the exception in the bills of lading of liability in respect of "neglect of master" the owner has doubtless contracted himself out of his liability in respect of improper stowage. The question to be decided is—Has the master also done so? If he has not, the words 'neglect of master" must be considered as, surplusage as respects the master, or they must have a different meaning, or be ambiguous. "Neglect of master" probably means the opposite of due care on the part of the master—the onus of which is cast on him by the law. Consequently their use would imply a desire to escape, by way of exception, such onus. A contract to effect such desire is not illegal; hence I am driven to no ambiguity as of necessity. No necessity for a different meaning is apparent. It is not right to treat as surplusage that which can have a meaning. If possible, every part of the bill of lading must have a meaning; there being no ambiguity of necessity, and no necessity for a different meaning, it should have the same construction in favour of the master as of the owner; consequently I think the master is within the exception, and that, in the face of the exception in this bill of lading, the plaintiff has no case. Again, looking at the bill of lading as an agreement before it was signed to ascertain generally what were the exceptions in it, it will be found that one is the neglect of the master. Then the question arises in whose favour, and against whom, are exceptions made in an agreement? The answer is, the parties. Since its signature the parties to this bill of lading are the owner, master and shipper, consequently they are the persons in whose favour the exceptions in it operate. Before it is signed, it is clear that in favour of the parties, the neglect of the master is excepted. Does the fact that the master becomes a party to it alter its constitution? I think not. There must be judgment for the defendant with costs.

MEIN, J.: In this case the plaintiff seeks to recover from the defendant, as master of the steamer "Cloncurry," damages resulting from the negligent stowage of certain glass that was delivered to him for conveyance in his vessel from Liverpool to Brisbane; and it has been contended that the defendant is not liable by reason of a stipulation in the bill of lading, under which the goods were shipped. By the maritime law, in the absence of agreement to the contrary, it is the duty of the master, on the part of the owner, to receive and properly stow on board of his vessel the goods to be carried. For any damage to the goods occasioned by personal negligence in the performance of this duty, the master is liable to the shippers and their assigns. The duty, however, can be modified by contract, and the master can protect himself, even from the effect of his own negligence, by a contract to that effect. But

the contract will not be so construed unless it is clear and unambiguous in its terms, for "the general rule is that, when there is any doubt as to the construction of any stipulation in a contract, we ought to construe it strictly against the party in whose favour it is made." (Brett, M.R., in *Burton v. English*, 12 Q.B.D., 220.) The clause in the bill of lading on which the defendant relies is as follows:—"The act of God * * * any act, neglect, or default whatsoever of pilots, master, or crew, or other servants of the company * * are excepted." Looking at these words, we must consider what all the parties to the contract had in their minds at the time they entered into it. To exonerate the master we must be satisfied not only that he intended to free himself from all responsibility for his own misconduct, but also that the persons shipping goods under it did so on the understanding that the master might deal with them negligently without being responsible. Can it be said that the exception has been so clearly expressed that the shippers ought to have understood, when they delivered their goods, that they would be without redress against the master if he negligently failed to perform the duty which the law cast upon him of properly stowing the goods they were intrusting to his care and control? I have arrived at the conclusion, though not without some hesitation, that the shippers did not deliver their goods to the defendant on any such understanding, The exception is expressed in the third person; the word "master" immediately precedes the words "crew, or other servants of the company;" and the terms of the stipulation are such as would be aptly used by one, in this instance the shipowner, who wished to relieve himself from responsibility for the acts and misconduct of his servants and others not immediately under his persoual influence or control. The language is not such as would ordinarily be used by one who sought to protect himself from the result of his own misconduct. To secure such protection the words used should be direct and explicit, and should make it apparent that the shipper was being deprived of a right that he had independently of the written agreement. This the defendant here has failed to do, and he should not be discharged from the obligations which the law has cast upon him.

LILLEY, C.J.: There will be judgment for the plaintiff with costs.

Solicitors for plaintiff: *Macdonald-Paterson & Co.*

Solicitors for defendant: *Hart & Flower.*

DECEMBER SITTING OF THE FULL COURT.

In the matter of JAMES LORIMER BANNATYNE.

Lilley moved the admission as a barrister of the Court of Mr. James Lorimer Bannatyne. Mr. Bannatyne had not the certificate of the Board of Examiners for Barristers. He was a barrister of the Supreme Court of New Zealand, and on his making application for the board's certificate they wrote to him refusing it on the grounds that he was not within section 17 of the *Reg. Gen.* of Sept. 7, 1880; that in New Zealand the branches of the legal profession were not separate; and that under the conditions of reciprocity Mr. Bannatyne ought to pass an examination in the laws of Queensland, so far as they differ from those of New Zealand. Refers to *The Law Practitioners Act of 1882* of New Zealand. The branches of the profession are distinct,—sections 4, 6, and 16.

Lilley, C.J.: He has been admitted somewhere else before New Zealand, according to the certificate.

Lilley: His original admission was in Cape Colony.

LILLEY, C.J.: Then the admission is refused.

FEBRUARY SITTINGS OF THE FULL COURT.

In the matter of JOHN TAYLOR RICHARDSON, OF ROCKHAMPTON.

The Supreme Court Act of 1867 (31 Vict., No. 23) Sect. 41—Contempt of Court.

Section 41 of *The Supreme Court Act of 1867* being a

penal section, the weight of evidence, required in a criminal case, is necessary to show that a person has been guilty of a breach of it.

THIS was a motion to make absolute a rule *nisi* calling upon John Taylor Richardson to show cause why he should not stand committed for misbehaviour and contempt of Court for that, not being a qualified person, he did for reward or fee, prepare a certain instrument in writing relating to proceedings in law, to wit: a petition in insolvency on behalf of one Frederick Armstrong Williams.

Lilley appeared for the Queensland Law Association, to move the rule absolute. *Byrnes* appeared for the respondent.

From the affidavit of F. A. Williams, which was filed in support of the motion, it appeared that in the month of February, 1886, Williams called upon the respondent and requested him to take the necessary steps to have him adjudicated insolvent, which the respondent consented to do. On the 5th of February, 1886, the insolvent paid to the respondent, at his request, the sum of £5 on account of his trouble in preparing the necessary documents, and to reimburse him for the necessary outlays in obtaining adjudication. The respondent thereupon prepared the said documents, and filed the same with the District Registrar in Insolvency at Rockhampton, after having affixed to the petition duty stamps to the amount of £2 1s. 0d. The said petition afterwards lapsed, and three months afterwards another one was drawn up, when the insolvent paid to the respondent a further sum of £4. A receipt for the sums of £5 and £4 so paid was given to the insolvent by the respondent, which receipt was as follows:—

ROCKHAMPTON,
26th August, 1887.

Received from Mr. F. A. Williams—
1886.
February 5th, the sum of five pounds,
Aug. 9th, „ „ „ four pounds,
being for and on account of filing petition in insolvency.
£9 : 0 : 0

JOHN T. RICHARDSON.

The respondent filed an affidavit in which he admitted having drawn up the petition, and having received the sum of £5, but he stated that the said sum was paid to him by the insolvent as an accountant and for his services in making up the books of the insolvent, and that he charged nothing for the petition. That he afterwards paid to the insolvent the sum of £2 1s. for the purpose of affixing the necessary stamps; and that the insolvent himself filed the petition. The insolvent was afterwards informed by the District Registrar at Rockhampton that adjudication could not be obtained except by the employment of a solicitor in Brisbane, and the matter was placed by the respondent in the hands of R. W. Kingsford, a solicitor in Brisbane, who undertook to obtain adjudication for the sum of £4 3s.

The respondent thereupon obtained from the insolvent the said sum of £4, and paid to the solicitor the sum of £4 3s. and the said solicitor thereupon obtained the adjudication.

LILLEY, C.J.: The charge here is that Richardson had prepared for or in expectation of a fee, gain, or reward an instrument in writing relating to proceedings in law in this Court. It has been held in this Court that the preparation of documents for proceedings under *The Insolvency Act* by persons not properly qualified according to statute is a breach of *The Supreme Court Act*, 31 Vic., No. 23, and that Act imposes a penalty, and directs that it shall be deemed to be a contempt of court to do so for reward or fee, and shall be punished accordingly. In this case it is alleged that Richardson prepared a petition in insolvency for reward. That would be a clear breach of section 41 of the Act, if it had been brought home to him. But this is a penal section, and although the case is one of suspicion, of gross suspicion, still the rule as to weight of evidence, I think, under this section ought to be the same as that in a penal or criminal case. It ought to be proved by satisfactory evidence, and I think I might almost lay down the rule, for myself, that it should go beyond a reasonable doubt. The evidence in this matter ought certainly to be weightier than that required in a civil suit, where I should tell the jury to take

the balance of evidence. If it inclined ever so little—to the weight of a feather—one way or the other, they might give their verdict according to that weight; but in a penal or criminal proceeding, especially a criminal, a judge lays down a different rule;—he says this must be proved beyond a reasonable doubt, on which they must hesitate to act in the most important affair of life. I think where a penalty is exacted we should rather demand the weight of evidence required in a criminal case than in a civil proceeding. In a case of this kind, I think, if there is a clear weight of evidence to show that a man has been guilty of a breach of the law, we should act. I think there is not that weight of evidence here. To my mind it is a case of gross suspicion; and I think the Law Association, acting for the protection of the profession and of the public, have done rightly. There is not sufficient evidence for us to find defendant guilty of the alleged contempt of court; and the rule should be discharged without costs.

HARDING, J.: I think also that should be the result of the application. It appears to me very desirable that an association of this kind should bring matters before us when suspicious cases arise; and I think that, where a man acts in a suspicious manner, he renders himself liable to the consequences of his so acting, the consequences being that he is charged with doing that which he gives reasonable suspicion that he is doing. I think there is reasonable foundation in this case for suspecting Mr. Richardson to have been acting in contravention of the statute, but this being a penal proceeding it is not for him so much to clear himself as it is for the other side to show that the offence has been committed. If he can, by showing facts or circumstances, so mystify the case that he can induce the judges on the bench, or the jury in the box, to hold that the case is not fully built up, he succeeds. At the same time he does not clear himself from suspicion. Not only that, but he remains liable to the consequences of being brought here,—the not getting his costs, though not convicted.

A few words as to the meaning of the words of the section, "any proceedings in law or equity." I think that means all proceedings in this Court in respect of which jurisdiction is given to this Court by the law of the land, whether called Common Law, Equity, Insanity, or Insolvency. As long as the jurisdiction is given to this Court by the law of the colony, I think that is what is meant by these words. I think the rule should be dismissed, without costs.

MEIN, J.: The conduct of the respondent is not altogether free from suspicion; but I have arrived at the same conclusion as my learned brothers, that the evidence is by no means conclusive that he is guilty of the act with which he is charged. Under these circumstances I concur that the rule should be discharged, but without costs.

Solicitor for Association: *Osborne.*

Solicitors for respondent: *Thynne & Goertz.*

In the matter of "The Licensing Act of 1885," and of WALTER MCFARLANE.

The Licensing Act of 1885 (49 Vict., No. 18), sec. 109—Unlicensed person, sale by—Mortgagor and mortgagee.

The holder of a licensed victualler's license for a certain hotel in Brisbane, in 1887 assigned all his interest in the stock-in-trade and furniture, fixtures, fittings, and other things then in or belonging to the said hotel, with the unexpired lease and the license and good-will of the same, to P. and Co., by way of mortgage to secure the repayment of moneys advanced by them; and by the mortgage-deed constituted the said company, their successors and assigns, or general manager, and each of them, jointly and severally, his attorneys. On the 31st day of December, 1887, the moneys secured by the said mortgage being still unpaid, P. and Co. took possession of the said hotel and the contents thereof, and although the mortgagor still continued to reside on the premises and had control of the servants, he was afterwards prevented from carrying on the business. In January, 1888, the said company, acting under an authority contained in the said mortgage-deed, appointed one W. M. to carry on the business of the said hotel. On the 5th day of January, 1888, the said W. M., acting on the said authority, sold two glasses of beer. The said W. M. was thereupon prosecuted under section 109 of *The Licensing Act of 1885* and convicted and fined £10, from which decision he now appealed.

Held, that the power of attorney given in the mortgage-

6 Q.L.J. 96
6 Q.L.J. 274.

deed, purporting to enable the mortgagees to place an unlicensed person in the position of keeper of the said licensed premises, was an illegal power, and that the person so appointed did not, under section 109, become the agent or servant of the holder of the license.

THIS was a special case stated by the Licensing Justices for the Licensing District of Brisbane, under the provisions of *The Justices Act of 1886*, who had convicted McFarlane for an offence under section 109 of *The Licensing Act of 1885*, and fined him £10, on the following facts:—

By a bill of sale dated the 7th of September, 1887, made between William John Leahy, the holder of the license for the Empire Hotel, in Brisbane, and Perkins and Co., Limited, merchants, the said W. J. Leahy, in consideration of moneys advanced to him by the said company, assigned to them, their successors and assigns, the stock-in-trade, and the furniture, fixtures, fittings, and everything in and about or belonging to the said hotel, together with the unexpired term of the lease and the license and good-will of the said hotel, and thereby constituted and appointed the said company, their successors and assigns, their general manager, and each of them, jointly and severally, his true and lawful attorney and attorneys. Payment of the money so advanced having been demanded, and the said W. J. Leahy having made default, the said company, on the 31st day of December, 1887, took possession of the said hotel and its contents, under the authority conferred upon them by the said bill of sale, and Leahy, although, at the time of the alleged offence, he resided in the hotel and had done so continuously, and retained the control of the servants, was prevented by the company from carrying on the business. About the 3rd of January, 1888, the company, under the authority of the bill of sale, appointed Walter McFarlane to carry on the business of the hotel on behalf of Leahy, and on the 5th of January, McFarlane, acting under the said authority, sold to one Michael Toomey two glasses of beer for 6d., which was the act complained of. Leahy stated that the liquor was not sold by McFarlane with his authority. McFarlane was not at any time the holder of a license, nor was he, otherwise than as by these facts appears, the agent or servant of Leahy. The grounds of the decision of the licensing justices were that Leahy could not assign his license for the hotel to the company, and by power of attorney authorise the company, in defiance of sec. 86 of *The Licensing Act of 1885*, to appoint an unlicensed person to be in effect the keeper of his licensed premises. McFarlane was convicted of the said offence, and fined £10.

The question for the opinion of the Court was whether McFarlane was the servant or agent of Leahy, within the meaning of section 109 of *The Licensing Act of 1885*.

Rutledge, *A.G.*, *Power*, and *Wilson* appeared for the respondents, the licensing justices; *Real* and *Lilley* for the appellant.

Real contended that by the bill of sale Leahy had empowered the company to appoint an agent for him, and that he could not afterwards revoke the authority so given. The company having, therefore, appointed McFarlane to manage the business, the only question was whether McFarlane became Leahy's agent, and he contended that he did become his agent, if such appointment was not illegal under the provisions of *The Licensing Act*, and that there was nothing in the Act to prevent the company appointing an agent on behalf of Leahy under the power given by him to the company by the bill of sale, and that Leahy's subsequent repudiation of McFarlane could not affect the question. He cited *Garrett v. Justices of Middlesex*, L.R. 12 Q.B.D. 620.

Lilley followed.

HARDING, J., after briefly stating the facts contained in the special case said:—The Justices under these circumstances convicted McFarlane. The conviction will be sustainable, and will be sustained, if he was not the agent or servant of Leahy at the time he sold the drink. He would, under this power of appointment contained in this mortgage be such agent or servant, if such power could be legally given by the licensed victualler to his mortgagee. The power to appoint a person to act as the agent and in the place of a licensed

victualler would be a power to insert in his place an unlicensed person, that is to say, would be, absolutely or in effect, a power to permit an unlicensed person to keep licensed premises. Now permitting such a thing to be done is, under the 86th section of the Act, illegal, and any contract or document by which one person contracted with another to give him power to do that which he could not do himself, and to thus commit an illegal act, would itself be illegal and void. Consequently, the power of attorney given in the mortgage, purporting to enable the mortgagee to place a person in that position, is an illegal power; and a person appointed thereunder does not, under section 109, become the agent or servant of the licensed publican. Consequently, when McFarlane sold these two glasses of beer, he was not the agent or servant of the licensed publican, and did not sell them as such agent or servant; and he, consequently, committed an offence under section 109. It is of that offence that the Justices have convicted McFarlane; I think the conviction must be sustained. I have not gone through the facts at any length; they have been stated in the special case, and consequently there is no controversy upon them, and I have delivered my judgment on the assumption that there is only one view of them,—that contained in the special case.

LILLEY, C.J., and MEIN, J., concurred.

Conviction affirmed, with costs.

Solicitors for appellant: *Thynne & Goertz.*

Solicitor for respondents: *Gill*, Crown Solicitor.

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1 C.L.R. 43

GALLOWAY *v.* PORTER.

The Local Government Act of 1878 (42 Vic., No. 8), secs. 46 and 95—Voting, manner of—Ouster.

At an election for the Municipal Council of Brisbane the ballot papers contained the names of two candidates. The voters in eight instances struck out the whole of the name of one of the candidates, and the Christian names of the other, and the returning-officer rejected the eight votes.

Held, that, under section 95 of *The Local Government Act of 1878*, in order to deprive a candidate of such a vote, the whole of the names must be struck out, otherwise, it is an indication of intention on the part of the voter to vote for the man any substantial part of whose name he leaves on the paper.

THIS was a motion to make absolute a rule *nisi*, granted by The Chief Justice on the 10th of February, 1888, calling upon Robert Porter to show cause why he should not be ousted from the office of councillor for the East Ward of the Municipality of Brisbane, on the grounds:—

(1) That at the election a majority of votes was polled in favour of William MacNaughton Galloway, and not in favour of Porter.

(2) That certain votes lawfully recorded in favour of Galloway at the election were wrongfully rejected by the returning-officer.

(3) That if the said votes had been received and admitted, Galloway would have been elected.

Real, for appellant, obtained the rule *nisi* before The Chief Justice.

It appeared that at an election for a councillor for the East Ward of the Municipality of Brisbane, for which there were two candidates, William MacNaughton Galloway and Robert Porter, eight voting papers were found in the ballot-box with the whole of the name "Robert Porter" struck out, and the Christian names "William MacNaughton" struck out also, but the surname Galloway untouched. These eight votes were rejected by the returning-officer, the result being that Porter had a majority of five votes, and was declared duly elected; whereas, if the eight votes had been counted, Galloway would have had a majority of three.

Power (*Byrnes* with him), for the respondent, contended that under section 79 of the Act the Christian and surnames of a candidate must appear on the ballot paper, and, therefore, that if any part of the name be struck out the whole must go; that the word "name" meant the whole name. The person nominated was not "Galloway," but "William MacNaughton Galloway," and the names "William MacNaughton" having been struck out, the returning-officer was right in rejecting the papers.

Griffith, Q.C. (*Real* and *Lilley* with him), for

the appellant, in reply, cited *In re Hutton; ex parte Haynes*, 5 A.J.R. 135, and contended that, the name "Galloway" having been left on the papers, it was clearly the intention of the eight voters to vote for Galloway and not for Porter.

LILLEY, C.J., gave judgment as follows:—This is a rule under *The Local Government Act of 1878*, section 46, paragraph 5, calling upon Mr. Robert Porter, who had been declared elected, to show cause why he should not be ousted from his office of councillor, on several grounds. The first ground is that,

> At the election for the said East Ward, held in the month of February instant, at Brisbane, a majority of votes was polled in favour of the said William MacNaughton Galloway, and not in favour of the said Robert Porter.

The second and third grounds are—

> 2. That certain votes lawfully recorded in favour of the said William MacNaughton Galloway at the said election were wrongfully rejected by the returning-officer.
>
> 3. That if the said votes so wrongfully rejected had been received and admitted by the said returning-officer, the said William MacNaughton Galloway would have been elected to the office of such councillor for the said East Ward.

Then there is an application for costs. The whole question of the validity of Mr. Porter's return as councillor depends upon the effect which ought to be given to certain voting papers, which are set out in the affidavit on behalf of the applicant. They are the usual ballot-papers, containing the names of the two candidates, printed, and nothing more—William MacNaughton Galloway and Robert Porter. Now the voters in eight instances struck out completely the name of Porter, but with respect to Mr. Galloway, they struck out his two Christian names, leaving his surname untouched. On behalf of Mr. Galloway it is said that these are eight votes which should be counted in his favor. They were rejected by the returning officer. It is clear that, on these eight, no vote could be made for Mr. Porter; his name was completely struck out. But on behalf of Mr. Galloway, these votes have been claimed. Now this depends on the construction of the second paragraph of the 95th section of the Act, in what manner a voter has to record his vote. By that section, first, every voter shall be entitled to one paper, or to such number as he appears by the roll to be entitled to, "such ballot-papers being in the form aforesaid, and every such paper shall be initialled by the presiding officer." Then by the second paragraph,—

> Every such voter shall thereupon without leaving the booth strike out from any or all of such papers the name of every candidate for whom he does not desire to vote and after such names have been so struck out the ballot-paper or ballot-papers as the case may be shall be folded up in such a manner as will conceal the names of the candidates and shall be forthwith deposited in the said box in the presence of the presiding officer.

With respect to this case our judgment must rest on the construction which we put on the words "strike out the name of every candidate." In the case of these eight ballot-papers, the name of Mr. Porter, has been struck out in every instance; and he can have no vote. In regard to Mr. Galloway's name, his name, I take it, has not been struck out, because they have struck out part only—his Christian names. In order to deprive a candidate of a vote, I think that the whole of the name, Christian and surname must be struck out, and, if that is not done, it is an indication of intention on the part of the voter to vote for the man, any substantial part of whose name he leaves on the paper. In this instance Galloway was left, which was equivalent to saying "I vote for Galloway," for William MacNaughton Galloway. Porter's name being struck out, is equivalent to saying "I do not vote for Porter." I think these votes should have been returned in favor of Galloway. Various difficulties have been stated that might arise from striking out a part of a candidate's name. Mr. Power's argument is that, not only must voters strike out the name of the man they do not intend to vote for, but they must leave in the whole of the name of the man they do intend to vote for. I think that is not necessary, if the voters leave enough of the name to show their intention to vote for the man of whose name they leave a substantial portion on the paper. I think the rule for ouster should go, with costs.

HARDING and MEIN, J.J., concurred.

Solicitors for applicant: *Thynne & Goertz.*

Solicitors for respondent: *Macpherson, Miskin & Feez.*

CASTLING AND OTHERS v. MAJOR AND OTHERS.

Will, construction of—Powers of the Trustees under the will to sell, lease, or mortgage the property devised.

THIS was a special case, stated by consent of parties, as follows:—

Special case stated by consent for the opinion of the the Supreme Court of Queensland pursuant to Order 34.

This action was commenced on the twenty-fifth day of October one thousand eight hundred and eighty-seven by a writ of summons whereby the plaintiffs claimed "as trustees "of the will of John Major deceased dated the eleventh "day of April 1878 for

"(1) A declaration that they are entitled upon the con- "struction of the said will to sell the real estate subject "to the trusts thereof

"(2) A declaration that they are entitled to lease the "said real estate

"(3) A declaration that they are entitled to mortgage "the said real estate

"(4) That the trusts of the said will may be carried into "execution."

And the parties have concurred in stating the questions of law arising hereon in the following case for the opinion of the Court.

1. John Major of Townsville in the Colony of Queensland duly made and signed his last will and testament dated the eleventh day of April one thousand eight hundred and seventy-eight in the words and figures following that is to say:—

"This is the last will and testament of me John Major "(commonly known as John William Major) of Townsville "in the Colony of Queensland Licensed Publican I hereby "revoke all former wills and testamentary dispositions by "me at any time made and I do declare this to be my last "will and testament I desire that all my just debts funeral "and testamentary expenses be paid and satisfied by my "executrix and executor hereinafter named as soon as con- "veniently may be after my decease out of my real estate "and now I give devise and bequeath all the furniture "goods chattels and effects which may be in upon or "about the premises known as the Royal Hotel situate in "Flinders Street Townsville and all horses cattle drays "carts waggons and harness I may be possessed of at the "time of my decease unto and to the use of my wife "Catherine Major now residing with me at Townsville "aforesaid her heirs executors administrators and assigns "absolutely for ever and now I give devise and bequeath "all the rest residue and remainder of my real and per- "sonal estate whatsoever and wheresoever and whether in "possession reversion remainder or expectancy unto and "to the use of my wife Catherine Major of Townsville "aforesaid and William Joseph Castling of Townsville "aforesaid Butcher their heirs executors and administrators "according to the tenure thereof respectively upon trust "that they my said executrix and executor shall stand "possessed of all the rest residue and remainder of my said "real and personal estate and shall pay the whole of the "rents interest dividends and income thereof unto and to "the use of my said wife Catherine Major so long as she "shall live and shall allow my said wife Catherine Major "to carry on the business of a licensed publican now carried "on by me at the Royal Hotel situate at Townsville afore- "said free of rent for the term of her natural life and upon "from and after the death of my said wife Catherine "Major my said trustees shall stand possessed of the resi- "due of my said real and personal estate and of the rents "interest dividends and income thereof and of the securities "interest and income thereof upon which the same may for "the time being be invested upon trust to pay lay out "apply and use the rents interest dividends and income "thereof in for and about the maintenance education and "advancement in the world of the four daughters of me the "said John Major named Clara Jane Major Florence Emily "Major Bertha Major and Phoebe Major in equal shares "until they shall respectively attain the age of twenty-one "years or marrying under that age my said trustees shall "pay to each of my said daughters her respective share in "and of the residue of my said real and personal estate and "of the stocks funds and securities the same may for the "time being be invested The shares of all my said four "daughters to be equal and the child or children of any of "my said four daughters who shall die in the lifetime of "my said wife Catherine Major to take his her or their de- "ceased parent's share and I hereby authorise and empower "the trustee or trustees for the time being of this my will "if and when she he or they shall see fit to call in sell and "convert into money such parts of my said real and personal "estate as shall not consist of money and to invest the pro- "ceeds and moneys arising from such sale calling in and "conversion in the name or names of her him or them the "trustee or trustees for the time being of this my will "in any public stocks funds Government freehold or other "securities as she he or they shall see fit and may from time "to time vary or transpose such other funds and securities "into or for others of a like nature at her his or their dis- "cretion And shall stand possessed of the moneys to arise "from such sale calling in and conversion and of the stocks "funds and securities in or upon which the same may for "the time being be invested upon the same trust as herein- "before mentioned and declared with regard to the residue "of my real and personal estate And I hereby appoint my "said wife Catherine Major and William Joseph Castling "of Townsville aforesaid Butcher executrix and executor "of this my will and I hereby appoint my said wife "Catherine Major during her lifetime and after her death "the said William Joseph Castling guardians of my said

"infant children during their respective minorities In "witness whereof I the said John Major have to this my "last will and testament set my hand this eleventh day of "April in the year of our Lord one thousand eight hundred "and seventy-eight."

2. The said John Major died on or about the twelfth day of December one thousand eight hundred and seventy-eight without having revoked or altered his said will and the same was duly proved in this Honorable Court in its Ecclesiastical Jurisdiction on the twenty-eighth day of February one thousand eight hundred and seventy-nine by Catherine Major and William Joseph Castling the executrix and executor thereof.

3. The said Catherine Major and William Joseph Castling have accepted and acted in the trusts of the said will.

4. The plaintiff Catherine Miller is the Catherine Major mentioned in the said will and was married to the plaintiff William Miller on the fourth day of November one thousand eight hundred and seventy-nine and the said Catherine Miller and William Joseph Castling are the executrix and executor mentioned in the said will and the Clara Jane Major Florence Emily Major and Bertha Major are three of the daughters of the said John Major mentioned in the said will.

5. The said Phoebe Major the daughter of the said John Major mentioned in the said will predeceased the said John Major and died on the fifteenth day of July one thousand eight hundred and seventy-eight without having attained the age of twenty-one years or been married.

6. The said Clara Jane Major attained her majority on the nineteenth day of October one thousand eight hundred and eighty-seven The said Florence Emily Major was born on the ninth day of January one thousand eight hundred and sixty-nine and the said Bertha Major was born on the ninth day of January one thousand eight hundred and seventy-two and they are still infants under the age of twenty-one years.

7. By an order of this Honorable Court dated the thirtieth day of November one thousand eight hundred and eighty-seven Frederick Johnson of Townsville in the said colony grazier was duly appointed the guardian *ad litem* of the said Florence Emily Major and Bertha Major for the purpose of concurring in this case in their name and on their behalf.

8. The said John Major died seized of an estate in fee simple in possession of all that piece or parcel of land in the County of Elphinstone Parish of Coonambelah and Town of Townsville being allotment number twenty of section number four containing one rood be the same more or less and having the whole of the land mentioned and described in Certificate of Title number 32334 upon which said piece or parcel of land is erected the "Royal Hotel" mentioned in the said will and the said John Major also died possessed of all those pieces or parcels of land in the county parish and town aforesaid being allotments eleven and twelve of section number nine containing one rood each more or less and being the whole of the lands mentioned in Certificates of Titles numbers 32174 and 40530 respectively upon which said pieces or parcels of land are erected two small wooden shops.

9. The said pieces or parcels of land in the preceding paragraph mentioned are the whole of the real estate of which the said John Major died seized possessed or entitled to for any estate whatever and the said John Major was not possessed of any personal estate at the time of his decease other than that devised and bequeathed to the plaintiff Catherine Miller.

10. Since the decease of the said John Major the said "Royal Hotel" and the said two shops have wasted and deteriorated and become totally unfit for occupation or for the purposes for which they were erected and the plaintiffs are unable to obtain any adequate rental for the same in their present state of repair and condition.

11. The real estate of the said John Major deceased is valued by competent valuators at the sum of thirty-three thousand pounds or thereabouts but the same is at the present time unsaleable at that price.

12. The licensing board for the District of Townsville has condemned the said hotel as unfit to be licensed for any further period and has intimated that a renewal of the license therefor will not be granted at the next annual licensing meeting to be held in April next unless the board is assured that a new hotel will be erected upon the site of the present hotel.

13. If a new hotel were erected upon the said allotmen number twenty of section number four the same would be readily leased for a weekly rental of twenty pounds and if suitable shop buildings were erected upon the said allotments numbers eleven and twelve of section number nine aforesaid the same could be readily let for a total weekly rental of thirty pounds.

14. If the license for the said Royal Hotel is refused and the same ceased to be a licensed house the income of the plaintiff Catherine Miller will be most seriously affected.

15. The plaintiffs have frequently attempted to let the said lands on building leases and upon leases for a term without a covenant to build but all persons to whom overtures have been made for those purposes have refused to take the same stating as a ground for refusing that they have been advised that the plaintiffs have no power under the said will to grant any lease of the same.

16. Unless the plaintiffs have the power to obtain money upon mortgage of the said lands for the purpose of building a new hotel and shop buildings and are empowered to grant leases thereof the income of the plaintiff Catherine Miller will be most seriously affected and the estate of the said John Major deceased will be greatly prejudiced and the expectant shares of the defendants greatly diminished.

17. Good management of the said trust estate of the said John Major deceased would direct that such new buildings as aforesaid be erected without delay and be let upon lease for a certain term.

18. Doubts on the points on which questions are herein submitted to the Honorable Court have arisen between the parties hereto and it has been arranged between the said parties that the said questions should be submitted to this Honorable Court and the present case is stated accordingly.

The questions submitted for the opinion of this Court are:—

1. Whether the whole of the property of the said John Major deceased is to remain unconverted and undivided until the death of the plaintiff Catherine Miller or whether the property is to be converted and divided upon the youngest or any child attaining the age of twenty-one years?
2. Whether or not the plaintiffs have power to sell the real estate of the said John Major deceased or any part thereof?
3. Whether or not the plaintiffs have power to lease the said real estate or any part thereof and if so for what term?
4. Whether or not the plaintiffs have power to raise money on mortgage or any part of the said real estate to build or effect repairs in connection with the said Royal Hotel and shops or for any other purpose?
5. By whom and out of what funds the costs of this case ought to be paid?

Lilley appeared on behalf of the plaintiffs; and *Pain* on behalf of the defendants.

Lilley: The reason of setting out the will in full was on account of its ungrammatical form, and its apparent omissions. As a rule trustees for sale have no power to lease for a particular term; but there are circumstances in each case on account of which the Court will hold that they have power to grant leases. Cited *Evans v. Jackson*, 8 Sim., 217.

LILLEY, C.J.: If the Vice-Chancellor meant that there was power to grant a lease beyond the term of her life, I do not agree with him. Our answers to the questions are:—To question No. 1, No; but at the discretion of the trustees; No. 2, Yes; No. 3, No; No. 4, No; and to number 5, costs out of the estate.

Solicitors for plaintiffs: *Roberts & Roberts.*

Solicitor for defendants: *Bernays.*

REG. *v.* LANE AND OTHERS.

5 Q.L.J. 80. 1914 St.R.Q. 301

The Local Government Act of 1878 (42 Vict., No. 8), Sect. 46—Ouster—Costs.

Where a party takes an advantage, and holds a position to which he is not entitled, he must pay the costs of the person who challenges his claim to that position and succeeds.

THIS was a motion to make absolute a rule *nisi*, obtained at this sitting of the Court, to set aside an election of councillors of the Shire of Windsor, and for ouster of three candidates returned as councillors at such election.

Lilley applied, on 14th February, for the rule *nisi* against W. H. Lane, Gregory Grant McLennan, and C. E. Birkbeck, on the following grounds:

1. That the returning-officer, Matthew Rigby, did not appoint poll clerks for the polling booths or places at Enoggera, Maida Hill, and the Town Hall of Brisbane.
2. That E. F. Birchett, the presiding-officer at the Town Hall aforesaid, did not initial certain of the voting papers delivered by him to voters who came to record their votes at the Town Hall.
3. That Charles White, the presiding-officer at Maida Hill, in certain cases, where voters had on their ballot-papers voted for one person, counted three votes in favor of such one person,

with costs as against Lane, McLennan, and Birkbeck.

The rule was granted on the second and third grounds, with leave to file further affidavits, returnable on 16th February.

On 16th February, *Lilley* moved the rule absolute, except as against Lane, who was absent from the colony, and had not been served.

Byrnes, for the respondents McLennan and Birkbeck, stated that they had retired, having resigned their seats in the Council. He contended that those respondents should not have to pay costs. They had retired when their election was questioned. The returning-officer and the Mayor should have been joined in these proceedings, as the returned candidates were not alone at fault. They were not keeping others out of the seats; but were simply occupying seats to which no one else was entitled. *Reg. v. Peck*, 4 Austr. Jur., 417.

Harding, J., referred to *Cole on Quo warranto*, p. 172; and to *Reg. v. Hobler*, 1 Q.L.J., 133.

Lilley cited *Reg. v. Warlow*, 2 M. & S., 75. The applicant was entitled to his rule absolute with costs.

LILLEY, C.J., delivered the judgment of the Court: The respondents who have appeared, Messrs. McLennan and Birkbeck, have not shown cause; as to them, we think it will be convenient to follow the rule adopted by the

Court in *Reg. v. Hobler*, to make the rule absolute with costs, notwithstanding their resignation. Where a party takes an advantage, and holds a position to which he is not entitled, he must pay the costs of the party who challenges his claim to that position and succeeds. There will be one general set of costs for which the respondents will be jointly and severally liable, except the particular costs of service, which will be against the individuals. The rule against Mr. Lane will, of course, be extended to the March sitting of the Court, by which time he may have consented to this order.

Solicitors for applicant: *Lilley & O'Sullivan.*

Solicitors for respondents appearing: *Wilson, Wilson & Brown.*

LILLEY, C. J. { 12th December, 1887. { 22nd February, 1888.

In the matter of J. A. MARSHALL AND CO., IN LIQUIDATION.

Insolvency Act of 1874 (38 Vict., No. 5), Rule 38—Insolvency Court—Jurisdiction—Discretion—Evidence.

Where a trustee in insolvency is asserting a claim to property, whether he claims only the same right as the insolvent himself would have had, or by a higher title than that of the insolvent, it is a matter of judicial discretion in each case whether the question shall be tried in the Insolvency Court or before the ordinary tribunals.

Ex parte Armitage In re Learoyd, Wilton and Co., 17 Ch.D., 13, followed.

The trustee in this case relied for proof of his title on public examinations taken in the liquidation proceedings, to which the respondent was no party, nor was he present at such examinations.

Held, that a person ought not to be affected, as a general rule, by evidence taken in a proceeding to which he was no party, and where he had no opportunity of cross-examination or of asserting his rights.

In re Brüner, 56 L.J., Q.B., 606, referred to.

THIS was a motion to make absolute a rule *nisi* calling upon Walter Smith and Major Colless to show cause why one-eighth share or interest in the Caledonia P.C. Gold-mining Claim, Croydon, standing registered in the name of the said Walter Smith, should not be declared the property of the trustee of the property of John Augustus Marshall.

Lilley appeared to move the rule absolute; *Griffith, Q.C.*, and *Ross* for the respondent Major Colless.

The facts and argument of counsel appear sufficiently from the judgment.

LILLEY, C.J.: In this case the trustee in the liquidation has moved absolute an order *nisi*, calling upon Colless, Smith, and Neville, to show cause why the trustee should not be declared entitled to the property in a certain one-eighth share standing in the name of Smith, on the register of the Caledonia Prospecting Claim Gold-mining claim at Croydon. Smith and Neville were claimants, and Colless claimed to be entitled to the share so registered as an innocent purchaser for value.

On behalf of Colless, who was the only party who appeared to show cause, counsel urged two preliminary objections to the proceedings. First, under *The Insolvency Act* and Rule 38, which latter gives a summary remedy in such cases by way of motion before the Judge in Insolvency. In support of this objection, counsel cited the case of *Ex parte Brown*, L.R., 11 Ch.D., 148, to the effect that "where a trustee in bankruptcy claims only the same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals; but where, by the operation of the law of bankruptcy, the trustee has a higher and better title than the bankrupt (where, for instance, a transaction is impeached as a fraudulent preference or an act of bankruptcy), the Court of Bankruptcy ought to decide the matter itself."

In this case, there being no charge of fraudulent preference, or any title in the trustee, other than that which the liquidating debtor himself would have had, if he had not conveyed the property away, it was urged that I ought to discharge the rule, and leave the parties to their remedy by an action in the ordinary jurisdiction of the Court. The judgment in the case of

Ex parte Brown was delivered by Lord Justice James, who explained in a subsequent case, that is, in *Ex parte Armitage*, L.R., 17 Ch.D., 13, that he did not mean, in *Ex parte Brown*, to lay down a binding absolute rule in all cases, but that the question must be decided in each case as a matter of discretion. Further research would have disclosed to counsel that in the case of *Ex parte Reynolds*, *In re Barnett*, L.R., 15 Q.B.D., 169, in the Court of Appeal, the judges expressly laid down that it is a matter of judicial discretion in each case how the question shall best be tried.

I declined on the hearing to accede to the objection; but reserved the benefit of it to the respondent, if I should think the case a proper one to be referred to the ordinary jurisdiction of the Court by action. I think that the present proceeding should generally be taken, that it is expeditious, comparatively inexpensive, convenient, and will meet almost every case that can arise where the question of property is in dispute. This objection then, I overrule.

As to the second point, the objection raised was that the trustee relied here for proof of his title on public examinations taken in the liquidation proceedings before a police magistrate, under an order of the Court; that Colless was no party to that proceeding, was not present at the examination, and in fact was in no way concerned in it; that he, at all events, had taken no part in the examination either by way of examination or cross-examination. This objection rests on the very well-known principle, which has been always followed in this Court, and on which there can be no reasonable dispute, that a man ought not to be affected, as a general rule, by evidence taken in a proceeding to which he was no party, and where he had no opportunity of cross-examination of the parties giving evidence, or of asserting his right. The question seems to have been raised before, and decided in England by Mr. Justice Cave, Judge in Bankruptcy, about the same time that this proceeding was moved here in July last. The report will be found in the November number of *The Law Journal*, just received in the colony. *In re Brünner*, 56 L.J., Q.B., 606, the head-note to the report states the effect of the decision concisely as follows:—"Upon a motion by the trustee against a creditor, to set aside as fraudulent a transfer of certain goods to him by the bankrupt, the trustee tendered in evidence the answers of the bankrupt upon his public examination: *Held*, that such evidence was not admissible." "If this evidence" says Mr. Justice Cave. "is to be admitted, an examination taken for a wholly different purpose, might, in a subsequent proceeding, raise a *primâ facie* case against a man which it might be a matter of great expense and difficulty to get rid of, and, in some cases, the difficulty would be very serious; for instance, where, as in the present, the question is, what was the intention of the bankrupt? and the creditor can only contradict the bankrupt's evidence on this point by indirect evidence. It would be very unjust if the statement of the bankrupt in his public examination should be admitted as evidence against every creditor in the bankruptcy, or indeed against other persons who have had nothing to do with the bankruptcy, but against whom there is a motion to restore property transferred by the bankrupt. It would be a grave innovation to hold that such an examination is evidence against any one referred to in it, or *primâ facie* evidence which a creditor must afterwards contradict; and I will not so decide, in the absence of a clearer indication that that is to be the law, either by statute or by definite decisions of a competent court. It is not a question merely of practice, but of right." I have already said that it has been a rule in this Court not to receive evidence, so taken, against third parties. The English courts are in accord with ours; I think, therefore, that this objection ought to prevail. I intimated my opinion that the evidence was not receivable against Colless when the matter was before me for final hearing, but I thought it better to allow the parties to put in all the evidence they thought fit. I think it advantageous to the trustee that I have done so, because

he is enabled to see that Colless claims as an innocent purchaser for value, and to see whether he has any prospect of success against him, either on an issue to be directed by me, or by setting in motion the ordinary jurisdiction of the Court, as he may be advised. I give no opinion on the merits of the matter; but, as the preliminary objection leaves no evidence in this proceeding on which I could make an order against Colless, I must grant what is the equivalent to a non-suit, that is, an order that unless the trustee within seven days takes some proceeding to assert his title, if any, against Colless, the rule as to Colless must be discharged, and so much of the fund in the hands of the Warden as he is entitled to—after deducting from the fund the unpaid balance of the purchase money, which must go to the trustee—be paid over to Colless, with his costs out of the estate. I leave the other claimants, Neville and Smith, to deal with Colless as to their alleged rights or claims.

Should the trustee proceed to prove his title, then the fund is to be paid into court by the Warden, and there to remain until such proceeding is determined, or until further order.

As to Smith and Neville, the order will be made absolute for payment of £350, the value of the share when sold to Colless, less such sum as the trustee may receive under the antecedent portion of my judgment; and they must pay the trustee's costs of this application.

Solicitor for trustee: *Unmack.*

Solicitors for respondent Colless: *Chambers, Bruce & McNab.*

LILLEY, C.J. { 10th October, 1887. 6th March, 1888.

LONG *v.* SMITH AND SMITH *v.* LONG.

Mortgagor and Mortgagee—Foreclosure Decree—Order Absolute—Opening Foreclosure—Practice.

The general nature of the circumstances under which foreclosure may be opened, considered.

THIS was a motion on behalf of the mortgagor, Smith, to open a foreclosure decree made in 1879 in respect of certain property at the corner of Queen and William Streets, Brisbane, now known as the "Longreach Hotel," under circumstances which are fully set out in the judgment.

Real, *Pain*, and *Lilley* appeared in support of the motion; *Sir S. W. Griffith, Q.C.*, and *Shand* for Long, the mortgagee.

The argument of counsel and cases cited appear sufficiently from the judgment.

LILLEY, C.J.: This is a motion on behalf of the mortgagor, Smith, to open a foreclosure decree made in October, 1879. Smith was lessee, with others, for a term of twenty-one years of property at the corner of Queen and William Streets, Brisbane. In May and September, 1877, he borrowed of Long two sums amounting to £9,000, on the security of his leasehold for the purpose of building, and amongst other premises he built what has since become the Longreach Hotel thereon. In September, 1877, Smith alleges that he had an offer of £22 a week from one "San Miguel," for a lease of the hotel for five years, and that Long, as mortgagee, refused his consent.

In August and September, 1878, Smith and his partners, who need not be further mentioned, made default in payment of the interest, which failure Smith avers was caused by Long, who "capriciously and without any valid reason "refused to consent as mortgagee to the said "lease" to San Miguel. Long denies that Smith & Co. at any time applied for his consent to a lease of Longreach to San Miguel, as alleged. On the default of payment of interest, Long, in September, 1878, made a written demand for payment of £9,633 8s. 2d., principal and interest then due under the mortgages. On the 20th November, 1878, the money being still unpaid, Long issued a writ for foreclosure in the action *Long v. Smith.* Smith entered an appearance, but did not deliver a defence. On the 5th or 9th of January, 1879, Long leased "Longreach," not then (as I understand the facts) an hotel, to Mrs. Jephson, for £6 a week. On the 15th of

the same month the ordinary foreclosure decree was made on Smith's consent. On the 18th of that month, the Registrar certified £11,478 16s. 3d., being the original mortgage moneys, interest, and other sums due to Long as mortgagee, and appointed the 18th July following for payment of that amount, which would have redeemed the property. In the meantime, in March, 1879, an offer of Henessey to take Longreach for seven years for an hotel, at a rental of £14 to £16 a week, was refused by Long. The evidence shows that before Henessey's proposal had been made, Long had leased the property to Mrs. Jephson, and, without a breach of contract with Mrs. Jephson, Long could not accept Henessey's offer. On the 14th July, 1879, the time for payment of the mortgage debt to Long was extended, by consent, to the 25th. There seems to have been another extension in August. On the 3rd of September, there was a further extension of time in Smith's favor until the 17th, and again until the 25th September. In October, an offer was made on behalf of Smith, by Julius Holland, for sale to a purchaser, and for opening an hotel on the property, Long to permit £10,000 to remain on mortgage. The offer was submitted to Long by his solicitor for consideration, but on the 28th October, Holland, being unable to arrange with Mrs. Jephson, withdrew his offer. On the 30th October, 1879, no further extension of time to redeem being asked, the foreclosure decree was made absolute. The effect of the evidence seems to me to be that the foreclosure decrees were not only unopposed, but really consent proceedings. The first decree was by express consent of Smith. It is sworn by Smith and Dinte that in the beginning of 1880, for the purpose of opening an hotel, the latter offered to discharge all Long's claims on the condition that Mrs. Jephson could be bought out; that Long consented, but Mrs. Jephson refused, and so nothing came of it. There is no express denial of this evidence about Dinte's offer by Long. In paragraph 20 of Smith's affidavit, respecting alleged communications between him and Long, on the subject of raising the money necessary to pay Long, and particularly with reference to a letter of the 16th October, 1881 (amongst other letters), in which it is said he, Long, "stated his "regret to hear that the defendants were unable "to do anything in the matter of the mortgaged "property, and that he was willing to deal more "leniently with them than an outside purchaser. "but that as they had given up all idea of repur- "chasing, he should remember that he had made "a loss in the event of his, at any time, realizing "a profit on the property." Long, in his affidavit (paragraph 5), says he has no copy of the letter of 16th October, and continues, "but I say that "I have never, since the date of the decree of the "foreclosure herein, looked in any other light "upon the defendants (Smiths) than as possible "purchasers of the said property. I have never "written or said anything to them which could "have led them to believe that I considered them "as still being in the position of mortgagors." I think the language of the letter itself shows that Long's version of these communications is correct. that he regarded Smith only as a possible repurchaser, and not as mortgagor. Smith (paragraph 22) avers that he continued his exertions to raise the money "to discharge the amount due to the "plaintiff (Long), but was unsuccessful until at "or about the beginning of March, 1887. I at "length succeeded in arranging for the obtaining "of the requisite amount, and I forthwith made a "tender by letter to the plaintiff Long of the "amount of the mortgage debt and costs, with a "request for reassignment of the mortgaged "property," and that, by a letter dated the 7th March, 1887, Long replied, "that he was not then "inclined to sell the mortgaged property, and "could not so consider my offer." Smith produces no corroboration of his statement that he had obtained the money, nor that he had any resources from which he could realise it; nor has any one testified that he was even ready to advance him the amount of money required for the purpose mentioned. In reply, Long (paragraph 6) says Smith did not "tender the amount

"of the mortgage debt and costs, or any part "thereof, with a request to reassign the mortgaged "property as stated in paragraph 22" (Smith's affidavit); "the only offers that I have received "from him are contained in two letters," which he sets out (A and B) with his reply. These letters are, Smith's, dated February 3rd and 4th, 1887, and Long's reply dated 7th March—the letter referred to by Smith which contains Long's refusal to sell. I think there was never any tender of the amount due to Long, either by letter or otherwise. No letter of March, 1887, from Smith to Long is produced. The letters of 3rd and 4th February are manifestly the letters referred to by Smith as the tender of March. Long's letter of 7th March is an express reply to them. Smith's letter of the 3rd February is an offer of £8,000 for a release or sale of a portion of the property. The letter of the 4th February is an offer of £8,300 for a release or sale of the property—the whole of it, I suppose from the increase of £300 on the previous offer. Long's reply of the 7th March was a refusal to sell or consider the offer.

On Long's refusal to sell or release, these proceedings were begun, and I was asked to open the foreclosure, and give Smith another opportunity to redeem the property from Long. An appeal was made to the indulgence of the Court on the ground that, even after sixteen years, under some circumstances the mortgagor was allowed to redeem: *Burgh v. Langton*, 5 Bro., Parl. Ca., 213; that the mortgagee, Long, still had the property, and no purchaser's rights intervened between him and the mortgagor Smith; that the property greatly exceeded in value the amount of the mortgage money at the time of foreclosure; that, notwithstanding foreclosure absolute, the transaction may, in the exercise of a judicial, not a capricious discretion, be treated as a subsisting security open to redemption: *Campbell v. Holyland*, L.R., 7 Ch. Div., 171; that the mortgage was created for the erection of buildings; that Smith had expended £4,000 more than the advance, a statement which is impeached by Long; that larger rents could have been obtained; that Long had capriciously refused larger rents than he obtained; and that, having received rent from Mrs. Jephson between the date of the Registrar's certificate and the final decree for foreclosure, Long had opened the foreclosure himself, and Smith should have had another period for redemption: *Webster v. Pattison*, L.R., 25 Ch. Div., 626. I think this last point wholly untenable; he had professional assistance, got all the time he asked for, and I think the final decree was made as much a matter of consent on his part as the first. As to the other circumstances, San Miguel's offer was not refused by Long; Henessey's offer was too late for acceptauce; Holland's offer was withdrawn because he could not buy out Mrs. Jephson's interest, and Dinte's offer fell through for the same reason. There is no charge of fraud nor wilful mismanagement on Long's part, other than the possibly implied or supposed misconduct in those transactions. On Long's behalf, it is said, it was a bad bargain at the time of foreclosure; that the burdens were £900 a year interest, and £230 a year ground rent, equal to £1,130 a year outgoing; that the greatest amount of rent that could be got was £600, leaving £530 a year deficiency. The Registrar's certificate, which is my guide, shows that the rents were at that time (January, 1879) £703, outgoings £318, net rental £384, to set against £900 a year additional outgoing for Long's interest, which leaves a deficiency of £526 a year. It was evidently not a paying property at that time, and, it is said, this is merely an appeal for mercy on the ground that the property has become more valuable since; and that the lapse of time is against Smith's right to redeem; that he should have come promptly: *Thornhill v. Manning*, 1 Sim., N.S., 154, *per* Lord Cranworth, and *Campbell v. Holyland*.

There are no circumstances then, outside the alleged excess of value of the property over the mortgage debt at the time of foreclosure, to justify me in opening the foreclosure. This excess of value, if great, might, with other circum-

stances, call for the indulgence of the Court, and the exercise of the judicial discretion. But was there that excess of value; and, if so, does it in this case entitle Smith to the aid of the Court to open the foreclosure and redeem? Now, as to the value, in his first affidavit, Smith swore that the value of the equity of redemption, at the date of the foreclosure decree absolute, was £38,440. If we add Long's mortgage, which a purchaser would have to pay off, £11,478 16s. 0d., this leasehold estate was then worth £44,918 according to Smith's estimate. There was no evidence of value on Long's behalf at the hearing before me, so I afterwards gave leave to both parties to make further affidavits. On Smith's part the affidavits of Fenwick, Buckland, and Stanley have been filed, and one by Smith. On the part of Long, a joint affidavit of himself and Cottell has been put in. I propounded specific questions to which the additional evidence was to be directed. Questions:—1st, "What would probably have been the value of the equity of redemption on the day of the foreclosure to a person, who, to redeem, must have borrowed the amount due to the mortgagee? This estimate to be made without reference to the subsequent advance in leasehold or other property values." 2nd, "What is the value of the equity of redemption to a person who must now borrow to redeem?" 3rd, "What is the value of the equity of redemption to a person with the money in hand?" The only evidence of any possible value on these questions is that of the skilled valuers. On the first question, Mr. Buckland thinks the value to a person who must have borrowed £11,359 5s. 9d. was £18,000, that is an excess over the mortgage debt of £6,640 14s. 8d., not a very large margin, when the deficiency of incomings as against the outgoings was £526 a year, as appears by the Registrar's certificate, and other evidence. The second question is erroneously stated in his affidavit, but his evidence on this point may be disregarded without prejudice to the final determination of the case. On the third question, he thinks the present value is £22,000. In answer to the first question, Mr. Fenwick values the property, at the time of foreclosure, at £17,000, a less margin by £1,000 than Mr. Buckland's. He also misstates the second question; but, in answer to the third, he values the property at from £20,000 to £21,030 according to the rate of interest. Mr. Stanley also misstates the second question. In reply to the first, he estimates the value at the time of foreclosure at £20,000, a margin of £2,000 in excess of Mr. Buckland's estimate, which would leave £8,640 14s. 3d. over the mortgage debt to meet the yearly deficiency of £526. In answer to the third question, he estimates the present value at £20,000.

Mr. Cottell on Mr. Long's behalf says, in answer to the first question, that the equity of redemption was of no value under the circumstances supposed therein. As to the second and third questions, he says the present value, under the circumstances supposed, does not exceed £1,634. From £44,918 to nothing, and from £20,000 to £1,634, there is "ample room and verge enough" for the judge's opinion. If Smith's valuers mean that the equity of redemption—the mere right to redeem—was worth the amount they mention, in addition to the sum to be paid to clear off the mortgage, then the difference of valuation is still wider and more remarkable. Smith's estimate may be put wholly out of consideration; and, if we take the largest excess of value at the time of foreclosure sworn to by the valuers, that is, £8,640 14s. 3d., on a property showing an annual deficiency of £526 in its working and interest charges. the foreclosure or sale would seem to have been almost a necessity of Long's position. There is no such excess of value as would make the judge say the foreclosure was inequitable. A prudent mortgagee generally requires the value of a freehold estate to be double the amount of the mortgage, to induce him to take the risk. That would have been, if this were freehold, £22,957 12s. 0d. The like rule of prudence would apply when a mortgagee is expected to continue the risk. It must be remembered, too, that Smith's interest

was leasehold for the residue of a term of twenty-one years, having about eighteen years to run at the time of foreclosure, and that the mortgagee must get both his principal and interest repaid out of the rents within that time, should the mortgagor make default. Smith's estimate of the value of the estate on the 3rd February, 1887, seven years after foreclosure, is thus stated in his letter:—"I am ready to give £8,000 if you "release or sell the property to me, and in doing "so I am sure you'll concur, that though I may "make a little (by) my looking after the place "personally myself, the time is too short to "recoup the entire loss, as the buildings cost "about £12,500." Now, upon what principle, if any, does a court of equity proceed in opening an absolute decree of foreclosure? They must act upon some line of reason or practical expediency, and doubtless of essential justice, but the Court is not charged with a benevolent authority to readjust acquired rights at its own will.

In *Campbell v. Holyland*, Sir George Jessel said,—"No Chancellor or Vice-Chancellor has "ever laid down that *any* special circumstances "are essential to enable a mortgagor to redeem;" but, in his subsequent observations, in which he sets out the various special circumstances which lead the judge to open the foreclosure, he shows that he really meant, "no judge has ever laid "down *what* special circumstances are essential "to entitle a mortgagor to redeem," or, in other words, to give him a reasonable claim to this form of judicial indulgence. In *Patch v. Ward*, L.R., 3 Ch. App., 212, before that decision, Lord Justice Rolt had said, "after the order for fore-"closure has been made absolute, it must be "shown that the person who seeks to set it aside, "or to have it disregarded, fully intended, and "was prepared to pay the money on the day, but "was stopped by some accident from complying "with the exigencies of the order;" otherwise "he can come to be relieved from it only on the "ground of it having been obtained by fraud." Lord Cairns, however, who took part in the decision, made no attempt to lay down a comprehensive or binding rule, or indeed any rule, or set of circumstances, except that, the case before him being one in which fraud was alleged, it must be proved. In *Wichalfe v. Short*, 3 Bro., Parl. Ca., 560, title "evidence," it is laid down, "as to the "pretended overvalue of the estate there was no "sufficient proof made of it, nor do witnesses "generally differ more in anything than in their "imaginary calculations or estimates of the value "of estates, but, if the fact had really been so, "yet an overvalue was not apprehended to be any "bar to a foreclosure, nor was an estate always to "lie open, if the party thought fit to neglect his "redemption in a reasonable time." In *Lant v. Crispe*, 5 Bro., Parl. Ca., 200, title "mortgages," it was held, that, "it is not consistent with the "rules and practice of courts of equity, nor "warranted by precedents, to enlarge the time "for redemption of a mortgage after the mort-"gagor's acquiescence for six years under a fore-"closure *by his own consent*." In *Burgh v. Langton*, which was greatly relied upon for Smith, according to the head-note to the report, "a decree "of foreclosure was opened after sixteen years, "on account of the equity of redemption being "worth much more than was due upon the "mortgage." On examining the report, however, it will be found that there were other circumstances in the case, something like a breach of trust—a purchase of the subject matter of the trust by the mortgagee to make himself master of the estate, and thereby have the mortgagor in his power—and there were also circumstances of hardship and oppression on the mortgagee's part, by turning rent and interest into principal, and charging exorbitant interest thereon. In the present case, there was no hurry over the foreclosure proceedings. They extended over eleven months, and gave Smith ample time to redeem. The decree was made by his own consent; there has been acquiescence in Long's possession as absolute owner for eight years; no great overvalue of the estate at the time of foreclosure has been proved, combined with other causes of relief; no subsequent increase of value, if it had even

been proved here, has ever been held to justify an opening of the absolute foreclosure: *Jones v. Kenrick*, 5 Bro., Parl. Ca., 244, title "mortgages," and head-note to *Tooke v. Bishop of Ely*, same vol., 181; and there has been no fraud, accident, surprise, overreaching, circumvention, oppression, or other special circumstance entitling Smith to relief. To call upon Long, now, under these conditions, to account as mortgagee, and in effect repay moneys which he has lawfully received for so many years, as absolute owner by Smith's acquiescence, would be, I fear, oppression by the authority of the judge.

Where an estate is not of sufficient value beyond the mortgage money to tempt a new mortgagee or purchaser to invest, foreclosure has this advantage that it tends to disencumber the estate, and to induce the mortgagee, who so becomes the owner, to improve the property. To deal with absolute foreclosure in a loose or capricious way would unsettle the business of mortgage investment.

Looking, then, at all the circumstances of the case, I must decline to open the foreclosure. The motion is dismissed with costs.

Solicitor for applicant: *Bernays*.

Solicitors for respondent: *Hart & Flower*.

HARDING, J. March 14, 1888.

Ante p. 58. Post p. 75.

In the Matter of JAMES LORIMER BANNATYNE.

Barrister—Certificate of fitness for admission—Reg. Gen. 7th Sept., 1880, Rules 17 and 21—New Zealand admission—Reciprocity under Rule 17.

A barrister of the Supreme Court of New Zealand seeking admission in Queensland, must pass an examination in the statute law of Queensland, so far as it differs from that of England, before he can receive the certificate of fitness for admission from the Board of Examiners for Barristers.

PETITION by Mr. Bannatyne, by way of appeal from the decision of the Board of Examiners for Barristers, refusing to give him a certificate of fitness for admission under *Reg. Gen.* of the 7th September, 1880, Rule 21.

Petitioner was admitted as a barrister of the Supreme Court of New Zealand on 8th November, 1887, and in the same month came to Brisbane. From the following December he had been employed as a clerk in the office of Messrs. Hart & Flower, solicitors.

Petitioner applied in person; *Chubb*, Q.C., *Mansfield* with him, appeared to oppose on behalf of the Board.

Chubb: Petitioner had been admitted in New Zealand as a barrister of Cape Colony, and there was no evidence that he had passed a general examination in New Zealand. Under the reciprocity rule, No. 17, petitioner should pass an examination in the statute law of Queensland so far as it differs from that of England; which was a "like condition" to that imposed in New Zealand. The professions of barrister and solicitor were not distinct in New Zealand, and the rules provided for the admission here of barristers of courts only where the two branches were distinct. In 1885 petitioner had applied to the Full Court to be admitted to the final examination for a solicitor, and also for admission as a solicitor, and had been refused by the Court.

Harding, J., said that, in view of petitioner's previous applications to the Court, there was a strong presumption that he had gone to New Zealand, where he could be admitted without undergoing a general examination, to evade the rule here, and that was the point he must fight upon.

Petitioner said that there was no evidence that he had attempted to evade the rule. He had intended to stay in New Zealand; and passed a close examination there. His health had been a consideration in regard to his movements. If it was necessary to pass any further examination here, he was willing to submit to it, if His Honor would order it.

HARDING, J., said it was not his function to make such an order. If he did, he would render himself liable to an appeal by the Board to the Full Court. He must dismiss the petition on the ground taken by the Board,—that the petitioner

had not passed an examination in the statute law of Queensland, required, according to the reciprocity rule, from barristers of New Zealand, applying for admission by this Court. He intimated, that, in his opinion, there was possibly a fatal objection to the admission of the petitioner behind that taken by the Board.

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ante p. 58. p. 74. 4 Q.L.J. 98.

APRIL SITTING OF THE FULL COURT.

In the matter of JAS. LORIMER BANNATYNE.

Barrister—Reg. Gen. of 7th Sept., 1880, Rule 17—Cape Colony and New Zealand admissions—Reciprocity.

A barrister of Cape Colony, admitted by the Supreme Court of New Zealand, on the qualification of his Cape Colony admission, and a partial examination in the statute law of New Zealand so far as it differs from that of England, is not a barrister of the New Zealand Court within the meaning of Rule 17.

Held, that, under that rule, the barrister shall have been trained under the eye of the Australasian Court upon whose certificate of admission he claims admission by this Court.

Graham's case, 2 Q.L.J., 88, and *Mackay's case*, 2 Q.L.J., 178, applied. Harding, J. (*supra p. 74*), affirmed.

Mr. Bannatyne, in person, moved, by way of appeal from Mr. Justice Harding *(supra)*, his admission as a barrister; or, alternatively, for an order to the Board of Examiners for Barristers to examine him in the laws of Queensland, so far as they differ from the laws of England. He did not produce the Board's certificate of fitness for admission.

LILLEY, C.J.: Then you cannot be admitted.

As appears in the report of his previous application to the Court *(supra, p. 58)*, Mr. Bannatyne's original admission as a barrister was in the Supreme Court of Cape Colony, upon which qualification, supplemented by an examination in the statute law of New Zealand, he was admitted by the Supreme Court of the latter colony. Following the above-mentioned decision, the Board had refused to examine him.

Mr. Bannatyne now applied for the alternative order on the Board. He referred to his previous application for admission: 3 Q.L.J., 58. Since then he had filed an explanatory certificate from the Supreme Court of New Zealand, and had applied again to the Board for their certificate. They had treated his application as an original one; had ignored the supplementary certificate; and refused their own certificate. He had appealed against that decision to Mr. Justice Harding, and His Honor had held that not having passed the examination, he was not entitled to admission. The appellant had then applied to the Board to be examined in Queensland statute law; and they refused. He now applied to the Court for an order upon the Board to examine him accordingly. The examination he had passed in Cape Colony was equal to that of LL.B., and he could produce a certificate to that effect.

Lilley, C.J.: But admissions of the Cape Courts are not acknowledged here.

Mr. Bannatyne admitted that; but applied on his admission in the New Zealand Courts. Referred to *In re Graham*, 2 Q.L.J., 88, and *In re Mackay*, 2 Q.L.J., 178, at 179.

C. A. V.

LILLEY, C.J., on the 10th of May, delivered the judgment of the Court, as follows:—This is an application by way of an appeal from the Board of Examiners for Barristers, refusing to examine the applicant, Mr. Bannatyne, in the law of Queensland, so far as it differs from the law of England. The object of his application to the Board for examination was, to found a claim for admission as a barrister in this colony. On a previous occasion, some time ago, Mr. Bannatyne applied to the Court on a qualification as a barrister, which he had received from the Supreme Court of the Cape of Good Hope, and upon that qualification he sought admission as a barrister here. His application was refused. He then went to New Zealand, and there upon a limited examination in the law of New Zealand—so far as it differed from the law of England—and upon his certificate as a barrister of the Cape of Good Hope, he was admitted as a barrister of the Supreme Court of

New Zealand. Upon that, he came up here claiming admission under one of our rules, which gives reciprocity of admission to the barristers of the Australasian Colonies in which our barristers may have a similar right, and upon the like conditions. Our rule of reciprocity is No. 17 in the rules for the admission of barristers, and it prescribes that—

> any person may be admitted to practice as a barrister of the said court at any monthly meeting of the Full Court, who shall have been duly admitted as a barrister or advocate in some one or other of the Queen's Superior Courts of Record in Great Britain or Ireland, or of any of the Australasian Colonies in which the professions of barristers and solicitors are distinct, and which grant the right of admission to barristers of this Court, and on the like conditions.

Mr. Bannatyne applied here upon his New Zealand certificate to Mr. Justice Harding, for an order to the Board to grant him its certificate for admission, which they had refused to do, but my learned brother declined to make the order, because the applicant had not complied with the condition prescribed by the rule. The New Zealand Courts requiring that our barristers should be examined in the law of New Zealand so far as it differed from the law of England, it was clear that the New Zealand barrister coming here must be examined in the law of Queensland so far as it differed from the law of England. At the same time, my brother Harding intimated that behind this objection there was another, and probably a fatal one to the right of admission. Mr. Bannatyne then applied to the Board to be subjected to this limited examination, and the Board, resting upon the want of qualification, namely, that he was a Cape of Good Hope barrister and not a New Zealand barrister within the meaning of this rule, refused to prescribe the questions for this limited examination. Then, upon that, Mr. Bannatyne appeals to us. He says, "I am, within the terms of your own rule, a duly admitted barrister of the Supreme Court of New Zealand, and I ought, upon being examined in the way prescribed by the rule, to be entitled to admission." He asks us either for admission, or for an order to the Board of Examiners to examine him with a view to his ultimate admission as a barrister of this Court. Well now, in respect of solicitors, there is also reciprocity of admission between this Court and the other Australasian Courts. The rule of reciprocity in relation to them is in the same terms as that in relation to barristers, and we have in the case of solicitors judicially decided the matter in the case, *In re Mackay*, cited by Mr. Bannatyne, and to be found in 2 Q.L.J., p. 179. We there laid down our interpretation of the solicitors' rule, which is, as I say, almost in the precise terms of that relating to barristers. We say there—"The rule of reciprocity is that we recognise the carefully trained solicitor of Victoria,"—and in this case the words New Zealand might be substituted,—"as eligible in this Court." It is also laid down that the rule is discretionary, in other words, that there is no absolute right in the person who comes here, holding a certificate of admission in New Zealand or Victoria or in any court, to admission, if we can or do find that behind that admission there is a lack of the condition prescribed in *Mackay's case*, namely, that he is not one who has been carefully trained and examined by the Australasian Court whose certificate he holds. Now, in this case, Mr. Bannatyne's qualification is not of that character. He goes to New Zealand, with the Cape of Good Hope certificate, which is not valid here. There is no reciprocity between that Court and our Court. Whether it would be a wise thing for all the Courts throughout the Queen's dominions to admit one another's practitioners, is not a question here. It would then probably be wise to require a like course of training in each country. There is no general rule on the subject, so we have been compelled to reserve a discretion in the matter. We have reserved to ourselves a right to see whether the original admission is within the terms of our rule. We have determined that we will accept only the trained solicitors of other Australasian Colonies, where an examination not lower than that prescribed for our own students is required; and

if an applicant comes to us with a mere Cape of Good Hope certificate, for instance, which may be very good elsewhere, we refuse, and shall continue to refuse him admission. When he comes here with a qualification which is partially an admission of New Zealand, but mainly a training in the Court of the Cape of Good Hope, we will say—"Your qualification is defective in as much as it is not wholly New Zealand." That is our interpretation of the rule, and it is not the first time it has come for adjudication. In the case of solicitors it has been twice so determined. Reciprocity means admission of a person fully trained and qualified in the Australasian Court from which he comes; a training of the same character as has always been required in the Courts of England. The practitioner is trained under the eyes of the Court; if a barrister, under the eyes of the benchers; if a solicitor, under the eyes of the Court, that is, in the office of one of the officers of the Court. The solicitor with whom he serves must be actually present, actively managing the business during the time of his training; it must be a personal training. In *Graham's case*, and in *Mackay's case*, we refused this kind of certificate as a qualification in the case of solicitors. And some years ago, when none of us was on the Bench, but the late Chief Justice, Sir James Cockle, and my late lamented brother, Mr. Justice Lutwyche, were the judges, a gentleman named Brown presented himself, with the certificate of a barrister of the Courts in England, but it was pointed out that his certificate was a qualified certificate. He had received it under a kind of tacit pledge that he was not to practice in England. One or two Inns of Court had betaken themselves, for the purpose of increasing their already enormous funds, to the work of qualifying cheap barristers for practice in India. This was largely taken advantage of by officials in the Indian service, who went home and spent two years there, and received an apparent qualification to practice in the English Courts, but they received it on the tacit understanding not to practice in England, though considered good enough for India. Our judges knowing that, and Mr. Brown, being a gentleman, admitting it, his admission to practice was refused. Now, here, we have a qualification, the basis of which—the greater part of which—is one we would not accept in this Court, supplemented with a partial examination, that is, in the laws of New Zealand, so far as they differ from those of England. We think it would not be an examination entitling Mr. Bannatyne to practice in this Court. We decide, upon the whole matter, that this admission must be refused.

In the matter of LESLIE JAMES JAMIESON, AN ARTICLED CLERK. 7 Q.L.J. 51.

Solicitor—Articled Clerk—Regulæ Generales, 1879—Rule 44, Schedule 2. 7 Q.L.J. 92

9 Q.L.J. 91.

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The answers to questions required by the Rules to be made by the master excused, under exceptional circumstances. Direct supervision of master during whole time of service excused, on ground that the master was absent on Court business, attending the Privy Council.

MOTION to make absolute a rule *nisi* granted by The Chief Justice at Chambers, on 4th April.

The circumstances of the case are as follows:—Mr. Jamieson was articled to Mr. H. Tozer, solicitor, Gympie, on 6th May, 1882, and continued the service until 22nd October, 1886, and had in the meantime passed his intermediate examination. Upon the latter date Mr. Tozer left for England, on business before the Privy Council. He gave Mr. Jamieson a certificate of his service up to that date; after which there then remained a period of six months and fourteen days of service to be fulfilled. On his departure Mr. Tozer left Mr. J. M. Stafford, a solicitor of the Court, as manager of the business during his absence, and under him Mr. Jamieson completed his term of service. In May, upon Mr. A. Conwell succeeding to the management of Mr. Tozer's business, Mr. Jamieson agreed and served a further period of seven months. Mr. Tozer had expected to be absent about six months, and requested Mr. Jamieson to remain in the office.. Mr. Jamieson

had applied to the Board of Examiners for Solicitors to be examined at the final examination in April, and had been refused on the ground that they were "not satisfied that he had complied with the provisions of Rule 44 of *Reg. Gen.* of 12th December, 1879, and that the special circumstances abovementioned were not sufficient, particularly with reference to the last eighteen months" of his service.

On these facts The Chief Justice granted a rule *nisi*, calling on the Board of Examiners to shew cause why they should not examine the applicant at the next final examination for solicitors.

Lilley appeared for applicant; and *Feez* for the Board.

From a further affidavit by applicant, which had been filed, it appeared that an assignment of articles from Mr. Tozer to Mr. Conwell, which applicant had forwarded to the former for signature, had not been returned to him, because he was himself returning to Queensland by the mail-boat leaving next after the despatch of his letter. An affidavit, by Mr. Conwell, as to applicant's service with him was also filed.

Feez submitted that the Board had properly refused to admit applicant to examination, because the master's answers as to service, required under Schedule 2 of the Rules of December, 1879, were not before them. There was, moreover, no affidavit by Mr. Stafford.

LILLEY, C.J.: Masters are continually going south for their health. Mr. Tozer was certainly attending to court business; that is, before our final Appeal Court, the Privy Council. This must be regarded as an exceptional case, but the Court think there ought to be a certificate from Mr. Stafford, and one, too, from Mr. Conwell, showing that he exercised a supervision over this young man. Let him be examined, but before admission these certificates must be provided to the satisfaction of the Board.

HARDING, J.: It will be an examination *nunc pro tunc*.

Solicitors for applicant: *Chambers, Bruce & McNab.*

MARYBOROUGH CIRCUIT COURT.

26th April, 1888.

THE QUEEN *v.* HAMILTON.

Criminal Law — Arson — House — Injuries to Property Act of 1865 (29 Vict., No. 5), Sect. 3.

A tent of canvas occupied for the time being as a dwelling is a house within the meaning of the statute, 29 Vict., No. 3, Sect. 3.

The Queen v. Dixon, 2 Q.L.J., 81, followed.

THE prisoner was tried at the Maryborough Circuit Court on 26th April, 1888, upon an information under sect. 3 of 29 Vict., No. 3, for feloniously, unlawfully and maliciously setting fire to a dwelling-house.

Chubb, Q.C., for the prosecution, opened that it would be shown in evidence that the dwelling-house in question was an ordinary canvas tent, occupied and used by its owner as a dwelling, and submitted on the authority of *The Queen v. Dixon*, 2 Q.L.J., 81, that such a structure was a house, within the meaning of the statute. Evidence having been adduced establishing these facts,

LILLEY, C.J., in summing up, directed the jury that a tent so occupied and used, was a house, within the meaning of the section.

IN CHAMBERS.

HARDING, J. 28th May, 1888.

KIRCHMANN *v.* VON SNARSKI.

Practice — Order XIV, r. 1a — Leave to Sign Final Judgment — Previous Summons Dismissed with Costs.

A summons for final judgment under Order XIV, Rule 1a, having been dismissed with costs, a fresh summons was afterwards taken out for final judgment under the same Rule.

Held, that the fact of the previous summons having been dismissed, was no bar to a fresh summons, and, under the circumstances, judgment ordered as prayed.

Semble.—Defendant having obtained leave to defend, would bar fresh summons for final judgment.

Chambers, for plaintiff, on a summons to vary

an order of the 26th April, 1888, dismissing a summons for final judgment with costs, and for leave to sign final judgment as per summons, with costs of this application, abandoned so much of the summons as applied for variation of the previous order, and applied for an order according to the residue of the summons.

There was no evidence for the defendant.

Chambers stated that there had been a summons for leave to sign final judgment already dismissed, and that the order thereon had never been taken out.

HARDING, J.: I hold, at all events, when leave to defend has not been given, and the defence has not been entered upon, it is open to the plaintiff, on further facts, to apply for leave to sign judgment, notwithstanding that a previous summons has been dismissed. The first alternative being withdrawn, order according to the latter.

Solicitors for plaintiff: *Chambers, Bruce & McNab.*

Solicitor for defendant: *Winter.*

JUNE SITTINGS OF THE FULL COURT.

MURPHY *v.* ITHACA DIVISIONAL BOARD AND ANOTHER.

Liability on contract of Divisional Board when part of contracting Divisional Board is constituted a Municipality—Apportionment of Liabilities—Suspension of Remedy—The Local Government Act of 1878, Secs. 9, 15, 16, 80, 237, and 240; The Divisional Boards Act of 1879, Secs. 53, 57, 80, and 81.

On 11th August 1886, Murphy made a contract with the Ithaca Divisional Board, to carry out certain rock cutting at Bowen Bridge, according to plans and specifications, and the Ithaca Divisional Board agreed to remove the earth, and leave the rock clear. The plaintiff deposited £100 with the Ithaca Divisional Board as security for carrying out the contract. On the 11th February 1887, prior to which date the Ithaca Divisional Board had, in all respects, carried out their contract, part of subdivision 1 of the Ithaca Divisional Board, comprising the rock cutting in question, was constituted a municipality, named the Windsor Shire Council. Since the 11th day of February 1887, neither the Ithaca Divisional Board or the Windsor Shire Council had removed the earth, or left the rock clear for the plaintiff. The Governor in Council had not apportioned the assets or liabilities between the Ithaca Divisional Board and the Windsor Shire Council under section 81 of *The Divisional Boards Act of 1879.*

Held, that neither the Ithaca Divisional Board nor the Windsor Shire Council were liable for breaches of the contract, as they were prevented by operation of law from carrying out the contract, and that the obligation to carry it out was repealed, or, at least, suspended, until the liabilities had been apportioned by the Governor in Council.

SPECIAL CASE.

This is an action brought for the recovery of £2994 18s. 10d. for damages for breach of contract dated the 28th day of August 1886 and by order of the Honorable Sir Charles Lilley Knight The Chief Justice of Queensland dated the 13th day of December A.D. 1887 according to Order XXXIV Rule 2 the following case has been stated for the opinion of the Court.

1. On or about the 14th day of August 1886 a contract by tender and acceptance was made and entered into by and between the plaintiff and the defendants the Ithaca Divisional Board whereby it was agreed that the plaintiff should execute the several works required in carrying out certain rock cutting on the Bowen Bridge Road agreeably to plans and specifications therein mentioned but not necessary to be herein set out and that the said defendants should remove all the earth from the cutting and leave the rock clear for the plaintiff and that the plaintiff should take out all the rock from the cutting and from the road and should have in return for his labour all the building stone from the cutting as compensation for work done in connection with the said contract and that the said defendants should purchase all the spalls for the purpose of road metal at the price of two shillings per cubic yard And it was thereby further agreed that plaintiff should deposit with the clerk of said defendants £100 as security for the proper performance and completion of the said contract and would within fourteen days from the date thereof execute and deliver at the office of the said defendants' overseer of works an agreement for such performance and completion.

2. The plaintiff in accordance with the said contract deposited the said sum of £100 and executed and delivered the agreement in the last preceding paragraph hereof mentioned.

3. By the indenture bearing date the 28th day of August 1886 made by and between the plaintiff of the one part and one Jesse Paten the Chairman of the defendants the Ithaca Divisional Board for and on behalf of the said defendants of the other part being the agreement mentioned in the last preceding paragraph hereof as having been executed and delivered by the plaintiff after reciting the tender by the plaintiff for the said works in paragraph one hereof mentioned and the said deposit of £100 and the acceptance

of the said tender by the said defendants in paragraph one hereof mentioned it was witnessed that if the plaintiff should and did well and truly perform and fulfil the said tender and the said contract arising out of such tender and the acceptance thereof then the said defendants would return the said deposit of £100 otherwise that they should retain the said sum of £100 or so much thereof as in their discretion they might think to be sufficient compensation for the non-performance of the said contract or of any breach therof.

4. The said rock cutting on the Bowen Bridge Road was at the times aforesaid situated within subdivision No. 1 of the district under the control of the defendants the Ithaca Divisional Board.

5. Prior to the 11th day of February 1887 the defendants the Ithaca Divisional Board at all times carried out the said contract in paragraph one hereof stated on their part and removed the earth from the cutting and left the road clear for the plaintiff and purchased the spalls and accepted and took delivery of the same and in all respects faithfully performed and carried out the said contract and the plaintiff in all respects performed and carried out the said contract.

6. By proclamation of His Excellency the Governor in Council dated the 11th day of February 1887 and by virtue of the provisions of *The Local Government Act of 1878* portion of the said subdivision No. 1 was constituted a municipality under the statute aforesaid and received the name of the "Shire of Windsor."

7. By proclamation of His Excellency the Governor in Council dated the 7th day of July 1887 and by virtue of the provisions of *The Local Government Act of 1878* the boundaries of the said Shire of Windsor were altered or amended.

8. The said rock cutting on the Bowen Bridge Road aforesaid is situated within the boundaries of the said Shire of Windsor as defined by the aforesaid proclamation.

9. The first Council of the said Shire of Windsor was elected on the 11th day of March 1887 and up to that date the defendants the Ithaca Divisional Board superintended the work at the said cutting.

10. On the 30th day of May 1887 the defendants the Council of the Shire of Windsor wrote to the other defendants a letter in the words and figures following that is to say:—

"Shire of Windsor
"Council Chambers Lutwyche
"May 30th 1887.

"To the Chairman
"Ithaca Divisional Board
"Sir

"I have the honor by direction to request you to notify "Mr. L. Murphy (contractor for the O'Connell Town "cutting) to assign over to this Council his contract for the "aforesaid cutting together with all plans specifications &c. "therewith connected.

"I have the honor to be Sir
"Your obedient servant
"E. F. BURCHETT
"*Shire Clerk*

"J. Paten Esq."

11. On the 7th day of June 1887 the defendants the Ithaca Divisional Board wrote to the plaintiff a letter in the words and figures following that is to say:—

"Ithaca Divisional Board
"Waterworks Road
"7th June 1887.

"Mr. L. Murphy
"Sir

"I have the honor by direction to inform you that a "letter has been received from the Windsor Shire Council "with reference to your contract for cutting &c. at "O'Connell Town and to ask if you will consent to the "assignment of said contract by this Board to the above "Council.

"An early reply to the above will oblige.

"I have the honor to be Sir
"Yours obediently
"F. SLAUGHTER
"*Divisional Clerk.*"

12. On the 23rd day of June 1887 the plaintiff wrote to the defendants the Ithaca Divisional Board a letter in the words and figures following that is to say:—

"Brisbane
"June 33rd 1887.

"To the Chairman
"Ithaca Divisional Board
"Sir

"I received your letter dated 7th of June *re* assignment "of my contract at O'Connell Town and in reply I beg to "inform you that I will not give my consent to the assign- "ment of the said contract to the Windsor Shire Council.

"I have the honor to be Sir
"Your obedient servant
"LAURENCE MURPHY."

13. The defendants the Ithaca Divisional Board at divers times made purchases of spalls under the said agreement up to and inclusive of the month of May 1887 but since that date neither the defendants the Ithaca Divisional Board nor the defendants the Council of the Shire of Windsor have removed the earth from the cutting or left the road clear for the plaintiff and have not purchased the spalls for the purpose of road metal or otherwise and the defendants the Ithaca Divisional Board although requested by the plaintiff have refused to accept and the defendants the Council of the Shire of Windsor although requested by the defendants the Ithaca Divisional Board have refused to take delivery of a large part of the spalls and have not in any way carried out or performed the said contract.

14. The defendants the Council of the Shire of Windsor purchased part of the said spalls in the preceding paragraph hereof mentioned from the defendants the Ithaca Divisional Board and on the 25th day of April 1887 the defendants the Council of the Shire of Windsor adjusted the proportionate part of the spalls in respect of which the purchase money was to be paid by them to the defendants the Ithaca Divisional Board and they have since paid the defendants the Ithaca Divisional Board for the same.

15. The plaintiff in this action alleges that by reason of the facts in the preceding paragraphs hereof stated he has

been prevented from taking out the said rock and getting the building stone from the said cutting and has lost the profits he would have made thereby and from the sale of the said spalls and from a performance by the defendants or one of them of the said contract and has been put to great expense in and about quarrying and fencing and lighting the said cutting and in respect of plant and material which he will be compelled to resell at a loss and has lost the said deposit of £100 and the interest thereon and has otherwise been injured and damnified.

16. The plaintiff also in the action alleges that the defendants the Ithaca Divisional Board are indebted to him in the amount of £12 2s. 0d. being the price of spalls sold and delivered to the said defendants by him under the said agreement and not paid for by the said defendants.

17. The Governor in Council has not apportioned the assets and liabilities since the incorporation of the said subdivision No. 1 of the Divisional Board of Ithaca and the Shire of Windsor as aforesaid.

The questions for the opinion of the Court are:—

1. Whether the defendants the Ithaca Divisional Board are liable to the plaintiff for the alleged breaches of the said contract?
2. Whether the defendants the Council of the Shire of Windsor are liable to the plaintiff for the alleged breaches of the said contract?

If the Court shall be of opinion in the affirmative to either of the said questions then interlocutory judgment in this action shall be entered for the plaintiff for damages to be assessed by a jury on writ of enquiry against the defendants so found liable.

If the Court shall be of opinion in the negative to both the said questions then judgment shall be entered for the plaintiff against the defendants the Ithaca Divisional Board for the return of the said deposit of £100 and interest thereon after the rate of £8 per centum per annum from the issue of writ to judgment.

All questions of costs are reserved for the discretion of the Court.

Real, *Byrnes* with him, appeared on behalf of the plaintiff; *Lilley* for the Ithaca Divisional Board; and *Rutledge*, *A.G.*, *Power* with him, for the Windsor Shire.

Mr. Justice Harding retired on account of personal interest in the case as a ratepayer of the Ithaca Division.

Byrnes stated the case, and contended that there was no breach until after the division of the Ithaca Division into the Shire of Windsor and the Ithaca Division. The Governor had not apportioned the assets and liabilities of the two bodies, according to ss. 80 and 81 of *The Divisional Boards Act of 1879*. Referred also to s. 57 of the same Act, and to s. 18, sub-sec. 2, *Local Government Act of 1878*. The act of the Governor in dividing assets and liabilities cuts away all liability.

Lilley: Plaintiff had lost his remedy, firstly, by operation of law; and, secondly, by his own act. Ithaca Divisional Board were to take off top soil—a personal act. They had lost control of the *locus*. If the Court forced them to carry out that undertaking they would force the Board to be trespassers. This covenant was virtually repealed by the statute: *Davis v. Cary*, 15 Q.B.R., 418, at 425. It was impossible for them now to carry out the contract. He relied upon *Brown v. Mayor of London*, 30 L.J., C.P., 225, at 229; *Newington Local Board v. Cottenham Local Board*, 12 Ch.D., 725, at 731-2; and *Newby v. Sharpe*, 8 Ch.D., 39. It was not *The Divisional Boards Act* that had prevented defendants from executing the contract, but *The Local Government Act*. This case is the same as *Newby v. Sharpe*, where *The Explosives Act* came into operation, and made certain acts become illegal; here by proclamation *The Local Government Act* is applied to a particular district. Cited *Hall v. Wright*, E.B. & E., 778; *Taylor v. Caldwell*, 3 B. & S., 833; and *Appleby v. Myers*, 2 C.P., 651. Impliedly it was understood that the Ithaca Board should have the cutting to strip; by an unavoidable accident—an act of Parliament—they could not now do so. There was no right to the £100 deposit. Plaintiff could only sue on the bond. As to costs, plaintiff was not entitled to them: *Ready v. Byrne*, 2 Q.L.J., 8.

Rutledge, *A.G.*, for the Council of Windsor Shire, submitted that there was no liability on that Shire. The covenant here could not be shown to run with the land; and there was nothing by law to attach the liability to Windsor Shire. Referred to s. 160, *Local Government Act*, as to mode of entering into contract by council. A local body was not liable in such a case, unless by express enactment: *Brown v. Mayor of London*. The Windsor Council might have obtained an assignment from the Ithaca Board, with concurrence of plaintiff; but plaintiff refused. The Council could not force itself in, and the plaintiff had placed the

obstacle in its way. The Council was not privy to the contract. As there had been no apportionment, it was not liable.

Byrnes, in reply: No assignment was asked for until 30th May; and there had been a breach of covenant in the meantime. Plaintiff did not complain of the operation of the law. The liabilities were not apportioned; the assets remained until apportionment at the disposal of the Ithaca Board.

C. A. V.

At the sitting of the Full Court, on Tuesday, 5th June, the judgment of the Court was delivered, as follows, by Mr. JUSTICE MEIN:—

This was a special case stated, without pleadings, by order of The Chief Justice, in an action in which the plaintiff claimed to recover the sum of £2,994 18s. 10d., for damages for breach of contract, dated the 28th of August 1886, and made between the plaintiff and the defendants, the Ithaca Divisional Board. The questions that have been submitted for the opinion of the Court are whether, under the circumstances mentioned in the case, (1) the defendants, the Ithaca Divisional Board, or (2) the defendants, the Council of the Shire of Windsor, are liable to the plaintiff for the alleged breaches of the contract? In case our judgment should be that either of such defendants are so liable, interlocutory judgment shall be entered for the plaintiff for damages to be assessed by a jury on a writ of enquiry against the defendants so found liable. In case we should decide that neither of the defendants are so liable, then judgment is to be entered for the plaintiff against the Ithaca Divisional Board for the return of a deposit of £100, made with that Board by the plaintiff at the time of the making of the contract, with interest thereon at 8 per cent. per annum from the date of writ to judgment.

The following are the material facts of the case:—

On or about the 14th August 1886, a contract, by tender and acceptance, was made and entered into, by and between the plaintiff and the defendants, the Ithaca Divisional Board, whereby it was agreed that the plaintiff should execute the several works required in carrying out certain rock cutting on the Bowen Bridge Road, agreeably to certain plans and specifications; that the said defendants should remove all the earth from the cutting, and leave the road clear for the plaintiff; that the plaintiff should take out all the rock from the cutting and from the road, and should have in return for his labor all the building stone from the cutting as compensation for work done in connection with the contract; and that the said defendants should purchase all the spalls for the purpose of road metal at the price of 2/- per cubic yard. The agreement further provided that the plaintiff should deposit with the clerk of the said defendants £100, as security for the proper performance and completion of the contract; and would, within fourteen days from the date thereof, execute and deliver at the office of the said defendants' overseer of works an agreement for such performance and completion.

The plaintiff deposited the stipulated sum of £100, and executed and delivered the agreement in accordance with the contract. This last-mentioned agreement was executed on the 28th August 1886, and provided that, if the plaintiff should, and did, well and truly perform and fulfil his tender, and the contract arising out of such tender and the acceptance thereof, then the said defendants would return the deposit of £100; otherwise they should retain the £100, or so much thereof as in their discretion they might think to be sufficient compensation for the non-performance of the contract, or of any breach thereof.

The rock cutting forming the subject of the contract, was, at the time of the making thereof, within subdivision No. 1 of the district under the control of the defendants, the Ithaca Divisional Board.

Prior to the 11th February 1887, the Ithaca Board, at all times, carried out the said contract on their part, and removed the earth from the cutting, and left the road clear for the plaintiff, and purchased the spalls, and accepted and took

delivery of the same, and, in all respects, faithfully performed and carried out the contract; and the plaintiff also, in all respects, performed and carried it out.

By proclamation of the Governor in Council, dated the 11th February 1887, and by virtue of the provisions of *The Local Government Act of 1878*, portion of the said subdivision No. 1 was constituted a municipality under such statute, and received the name of The Shire of Windsor; and, by a like proclamation dated the 11th July 1887, the boundaries of the said Shire of Windsor were altered or amended.

The rock cutting in question is situated within the boundaries of the Shire of Windsor, as defined by these proclamations.

The first Council of the Shire of Windsor was elected on the 11th March 1887, and, up to that date, the Ithaca Divisional Board superintended the work at the cutting.

On the 30th May 1887, the defendants, the Council of the Shire of Windsor, wrote to the other defendants, requesting them "to notify Mr. "L. Murphy (contractor for the O'Connell Town "cutting), to asign over to this Council his con- "tract for the aforesaid cutting, together with all "plans, specifications, &c., therewith connected.', On the 7th June 1887, the Ithaca Divisional Board wrote to the plaintiff a letter, asking if he would "consent to the assignment of said "contract by them to the Council of the Shire of "Windsor;" and, on the 23rd June 1887, the plaintiff replied that he would not give his consent to such assignment.

The Ithaca Divisional Board, at divers times, made purchases of spalls under the agreement up to, and inclusive of, the month of May 1887; but, since that date, neither of the defendants have removed the earth from the cutting, or left the road clear for the plaintiff, nor have either of them purchased the spalls for the purpose of road metal or otherwise; and the Ithaca Divisional Board, although requested by the plaintiff, have refused to accept, and the Council of the Shire of Windsor, although requested by the Ithaca Divisional Board, have refused to take delivery of a large part of the spalls, and have not, in any way, carried out and performed the said contract.

The Council of the Shire of Windsor purchased part of the spalls in the preceding paragraph mentioned from the Ithaca Divisional Board, and, on the 25th April 1887, the Council of the Shire of Windsor adjusted the proportionate part of the spalls in respect of which the purchase money was to be paid by them to the Ithaca Board, and they have since paid such defendants for the same.

The Governor in Council has not apportioned the assets and liabilities since the incorporation of subdivision No. 1 of the Divisional Board of Ithaca, and the Shire of Windsor.

The case further stated:—"The plaintiff in this "action alleges that, by reason of the facts stated, "he has been prevented from taking out the said "rock and getting the building stone from the "said cutting, and has lost the profits he would "have made thereby, and from the sale of the "said spalls, and from a performance by the "defendants, or one of them, of the said contract, "and has been put to great expense in and about "quarrying and fencing, and lighting the said "cutting, and in respect of plant and material "which he will be compelled to resell at a loss, "and has lost the said deposit of £100 and the "interest thereon, and has otherwise been injured "and damnified."

Upon the above state of facts, it was contended on behalf of the plaintiff, that there had been such a breach of the contract entered into between him and the Ithaca Divisional Board, as entitled him to recover from that Board the damages he had sustained by reason of the breach; or, if the Ithaca Board had been relieved from liability by force of the statute, the obligation to fulfil the contract devolved upon the other defendants, who had refused to execute it, and are accordingly bound to make good the damage he has suffered. For the Ithaca Board, on the other hand, it was contended that they were discharged from liability, through the performance of the contract by them having been prevented by the act of the law

on the creation of the Council of the Shire of Windsor, which had the effect of taking the subject matter of the contract out of the jurisdiction of the Board, and placing it under the control of the new municipality. And, on behalf of the Council of the Shire of Windsor, it was argued that they could not be held responsible for the performance of an agreement to which they were not parties, and which had been entered into before they had themselves been brought into existence; that, if it was competent for the Governor in Council, under the statnte, to make them liable for the completion of the contract, their obligation to complete could not arise until the will of the Governor had been declared; and that they had been relieved of any liability, present or prospective, by reason of the plaintiff's refusal to accept them as assignees of the contract.

In support of these contentions, several cases were cited—especially *Brown and others v. The Mayor of London* (30 L.J., CP., 225), *Taylor v. Caldwell* (32 L.J., Q.B., 165), *Appleby v. Myers* (2 L.R., C.P., 651), and *Newby v. Sharp* (8 L.R., C.D., 39). From these, and earlier cases, the following three propositions may be deduced:—(1) a contract which has for its object some performance, or act, which is strictly personal to the parties should, in general, be construed as made upon the implied condition that the parties on whom the personal obligation or duty is cast shall continue in existence to perform the contract; (2) where the nature and object of the contract sufficiently manifest that it shall not apply to any special contingency which would render the performance impossible, the contract, though expressed in absolute and general terms, should be construed as containing an implied exception of such event; and (3) where a party contracts to do a thing which is lawful and within the scope of his authority, and an Act of Parliament afterwards comes into operation and prevents him from doing it, the obligation is repealed. We are of opinion that the general principle that underlies all these propositions applies to the present case. The contract in question imposed the performance of physical acts on each of the contracting parties. It had for its object the excavation of certain rock, with the view, apparently, of cutting down and lowering the level of one of the roads then under the control of the Ithaca Board. The Board were, in the first place, bound to remove all the earth from the surface of the cutting, so as to leave the underlying rock clear for the operations of the plaintiff; and the plaintiff was then bound to take out the rock from the cutting and from the road. The powers and authorities of the Board were defined and limited by *The Divisional Boards Act of 1879*, which was repealed by an Act that came into operation at the beginning of the present year. Such repeal, however, does not affect the rights of the parties in the present case; they continue to be governed by the law as it stood when the alleged breach was committed. The Act named cast upon the Ithaca Board the "duties of constructing, maintaining, and control-"ling all public highways, roads, and streets . . . "within the division" (sec. 53); and authorized them, "in the name, and on behalf of, the division, "to enter into contracts for the purposes of the "Act" (sec. 57). By the 58th section, they were restricted in the application of their divisional fund, which comprised all rates and other moneys received by them from all sources whatsoever,—except special rates and loans, both of which were required to be applied to special works, not of the kind now under construction,—"towards the "payment of all expenses necessarily incurred in "carrying the Act into execution, and of doing "and performing all acts and things which the "Board are, by statute, empowered, or required, to "do or perform." By section 80, it was declared, that "nothing in the Act should prevent the "Governor in Council from constituting the whole, "or any part or parts of any division a munici-"pality under the provisions of *The Local Govern-"ment Act of 1878*, and the same, when so "constituted, should be subject to the provisions "of the said Act." It was in pursuance of this provision, and of the powers conferred on the

Governor in Council by *The Local Government Act*, that the portion of subdivision No. 1 of the Ithaca Board was constituted a municipality under the name of the Shire of Windsor. By force of both statutes, the new municipality, including all its highways, streets, and roads, became subject to the provisions of *The Local Government Act*. By the 237th section of that Act, it was enacted, that "the Council of every municipality shall have "the care, construction, and management of all "public highways, streets, roads . . . within "the municipal district;" and section 240 enacts, that "the materials of all public highways, streets, "roads . . . and all matters appurtenant "thereto, shall belong to the municipality of the "district within which the same respectively are." The rock cutting and road in question in this case are situated within the municipal district of the Shire of Windsor. All the materials thereof, and all matters and things appurtenant thereto, accordingly, by the act of the law, were divested from the Ithaca Board, and became the property of the Shire of Windsor, and the care, construction, and management of the road devolved upon the Council of that Shire, when the municipality was constituted, and the Council were duly appointed. The Ithaca Board then ceased to have any control over, or property in the road, in the earth on its surface, and in the rock beneath. Any attempt thereafter by the Board to remove the earth from the surface would have been a trespass upon the property of the Shire of Windsor; and any subsequent expenditure of money, either for the removal of the earth, or for the excavation of the rock, would have been a misapplication of the Board's divisional fund. The subsequent removal by the plaintiff of rock from the cutting would, also, have been a trespass by him on the property of the Council of the Shire of Windsor, unauthorized by any act of that Council. It has been urged, however, that the rights of the plaintiff under his contract were reserved by the provisions of the 81st section of *The Divisional Boards Act*. That section reads as follows:—"In the event of "the subsequent incorporation of the whole, or any "portion of, any division as a municipality, the "assets and liabilities of such division shall devolve "upon the municipality so incorporated; and, "when a portion only of any division is so incor-"porated, the Governor in Council shall apportion "such assets and liabilities in such manner as "shall appear to him just and equitable." This language is somewhat obscure, but we think that the reasonable interpretaion to be put upon the section is this:—Where the whole of a division was incorporated with, or constituted into, a municipality, such municipality became entitled to all the property, and assumed all the obligations of the incorporated division; and, where only a portion of a division was so incorporated, the property and liabilities of the division at the time of the severance were required to be apportioned by the Governor in Council, between the Board of the continuing division, and the municipality with, or into which the severed portion of the division had been incorporated. No such apportionment between the Ithaca Board and the Shire of Windsor has ever been made; but we feel bound to assume that, when it is made, it will be both just and equitable, and not inconsistent with the provisions of the law as they stood at the time of the constitution of the Shire of Windsor. Until it is made, there can be no devolution by law of any liability of the Ithaca Board on the newly constituted municipality. The obligations cast by the contract in question upon the contracting parties are, we think, liabilities within the meaning of the section we have quoted. To that contract, the Council of Windsor were not parties, and the Governor in Council has not declared that they shall be liable to the plaintiff for its fulfilment. They cannot, therefore, be held responsible for any failure, up to the present time, to perform it. Moreover, if it could be held that a liability to complete devolved upon that Council, we think the refusal of the plaintiff to accept them as assignees, when they expressed a desire to take over the contract, relieved them from all obligations in respect of it. If the law had cast upon them the obligations of

the contract, it must, at the same time, have conferred upon them all benefits to be derived from it; and these the plaintiff, by his refusal, debarred them from securing. It is clear, therefore, that whatever view may be taken of the position of the Council of Windsor, these defendants cannot be held liable for the breach of which the plaintiff complains. The question remaining for consideration is, can the other defendants be held to be so liable?

The agreement entered into between the plaintiff and the Ithaca Board must be taken to have been made subject to the provisions of the law as it then existed (*Newington Local Board v. Cottingham Local Board*, 12 Ch. Div., L.R., 725). The provisions of that law were such, as already pointed out, as enabled the Governor in Council by proclamation, of his own motion, and without the concurrence, and notwithstanding the dissent of the Ithaca Board, to remove the portion of the division that was affected by the contract from the control and authority of that Board, and to render it illegal for them to perform any work thereon. If the plaintiff intended to be guaranteed by the Ithaca Board against any effect which such a proclamation might have on the right of either party to take possession of, and deal with the rock cutting and road in question, he ought to have had stipulations to that effect inserted in the agreement. This he failed to do. As the matter now stands, the legal right of the Ithaca Board to be in possession of the road, and to remove the earth from the surface of it, has been taken away by a proclamation which was made under, and has the same force as, an Act of Parliament, and has been transferred to another, an independent, municipal body. Both parties must be taken to have contemplated, when they entered into the contract, the possibility of such a contingency arising; and, as the effect of it has been to render the Ithaca Board incapable of performing the contract, the obligation to do so, after the proclamation came into force, must be held to have been repealed, or, at least, suspended until the Governor in Council, if he has the power, and considers it just and equitable, shall again put them in possession of the road, and declare that the liability to fulfil the contract shall continue to be attached to them. It appears from the facts stated, that there was no breach before the proclamation was made. Upon the whole case, therefore, we are of opinion that neither of the defendants have been shown to be liable for the breaches complained of, and judgment must, in accordance with the terms of the case, be entered for plaintiff against the Ithaca Divisional Board for the return of the £100 deposited with them, together with interest thereon at the rate of 8 per cent. per annum from the date of writ to judgment.

The costs of these proceedings have been left to the discretion of the Court. The result of our judgment is that the plaintiff substantially fails in his claim; and we see no reason to interfere with the ordinary rule that the unsuccessful litigant shall bear the costs of the litigation. The plaintiff, therefore, must pay the costs of all parties in the action.

LILLEY, C.J.: A matter of public interest arose at the opening of the argument in this case. In consequence of my brother Harding being a ratepayer in one of the divisions concerned, he felt constrained by his reading of the law, in which we all agree, to retire from the hearing of the case. It is not the first time a judge of this Court has been compelled to leave the Bench in a matter in which he had interest. In the first case, I believe there was a matter pending for hearing and judgment between the Municipality of Brisbane and one of the ratepayers. I had no interest in the matter, other than the fact of my being one of the very numerous body of persons liable, each in the fractional part of a coin, if the verdict should be against the ratepayers. In that action I felt it my duty to retire. In another action, namely, when the Mount Morgan Company, in which I had a considerable interest, were before the Court, I, of course, retired. On the opening of this case, my brother Harding followed my example, and left the Bench. I believe doubt has

been expressed, where a judge's interest is so very small—perhaps the fraction of a farthing was the amount of his interest in this case—whether he ought to be so careful, or ought to retire on these occasions. We hold, that however slight the interest of the judge may be, he is bound and ought to retire from the Court in any dispute, in which that interest is involved. If he should persist in remaining on the Bench and adjudicating in the matter, the judgment, whatever the event, would be liable to be set aside, because an interested person had been concerned in its consideration and formation. I make these observations, not only because doubt, as I understand, has been expressed in some quarters, but also because I believe in another colony, where one of the judges was a ratepayer, because his interest was of that small amount I described in the subject matter of a case, judgment was given that his interest was not of that character which compelled him to retire. That was not in accordance with the authorities in England. There is no doubt, that whatever his interest, a judge is bound to retire. The matter has arisen in a very late case, reported in 57 L.J., M.C., 17; and in L.R., 20 Q.B.D., p. 58, since the matter was moved in this case. I may say that decision, affirmed as law in this Court also, affects not only Supreme Court judges, but all judges and magistrates. In some cases, in England, judges have been specially relieved by statute where they are ratepayers. Where a small interest may not interfere with the impartial exercise of their office, it perhaps would be well to introduce a similar measure here. It is natural that judges should hold property; we here all hold property, and a case might arise where all three might be bound to retire because property-holders and ratepayers. In such a case we might, from the very necessity of our position, be compelled to sit and decide, and in so doing to violate one of the first principles in the administration of justice—that a man cannot be a judge in his own cause. Justice Stephen has well laid down the decision of the Court in *The Queen v. Farrant*, the case of which I have spoken, as follows:—

In the first place, one of the leading principles before us is that no one can be allowed to be judge in his own cause, that is to say, in any matter in which he has any pecuniary interest. This rule has been carried very far, and held in *Dimes v. The Proprietors of the Grand Junction Canal*, to apply to a Lord Chancellor who had an interest as a shareholder in the defendant company, and in *The Queen v. The Recorder of Cambridge*, to a case where the deputy recorder made an order for costs in a rating appeal in which he was only interested in a most remote degree—namely, a rated inhabitant in one of the parishes interested. In the last-mentioned case the rule is stated as strongly as possible, but it has no bearing here, because it is not suggested here that the defendant had any pecuniary interest. But our law goes further, and says that if there is an interest which has substantially the same effect as a pecuniary interest, this will disqualify a party from acting.

In *The Queen v. Rand*, Mr. Justice Blackburn, in delivering the considered judgment of the Court, said,—"Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that where there is a real bias of this sort this Court would not interfere." In *The Queen v. Meyer*, the same learned judge also said,—"Though disqualifying interest is not confined to pecuniary interest, the interest, if not pecuniary, must be substantial. In *The Queen v. Rand*, we held that there was no ground for quashing the certificate of the justices. The effect of our judgment in that case was that, though pecuniary interest in the subject matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not *ipso facto* avoid the justices' decision; and we thought that though there was a possibility of bias in that case, yet it was not real. But we expressly excepted a real bias, saying 'that we must not be understood to say that where there is a real bias this Court would not interfere.' In the present case there is such a real bias." The same principle is laid down in *The Queen v. Handsley*, by Mr. Justice Cave, who delivered the judgment of the Court.

In this judgment it was found that the magistrate had no bias, and had acted properly; but the rule laid down, which will be enforced—will be held to be obligatory—is that, where the slightest pecuniary interest or the likelihood of a real bias in the matter exists, it is the duty of the judge or magistrate to retire from the consideration and determination of the case.

The judgment of the Court then, is for plaintiff against the defendant Board, for the return of the £100 deposited, together with interest from date of writ to judgment. The costs of these proceedings have been left to the discretion of the Court. We see no reason why the rule that the unsuccessful party shall pay, should not b

followed in this case. Costs of all parties to be paid by the plaintiff.

Solicitor for plaintiff: *Winter.*

Solicitors for Ithaca Divisional Board: *Chambers, Bruce & McNab.*

Solicitors for Windsor Shire Council: *Hart & Flower.*

REGINA *v.* ABRAHAM STREET, THE YOUNGER.

Embezzlement—Proof of status as clerk—Admissibility of a proof of debt sworn to by prisoner subsequent to date of embezzlement—Admissibility of a power of attorney dated five months after embezzlement.

One S., being in the employ of B. and Co., was charged with three several embezzlements, on 15th March, 3rd June, and 12th July. At the trial three proofs of debt were tendered, dated 14th April, 21st May, and 26th July, sworn to by S. as the clerk of B. and Co.

The proof of 26th July was objected to by counsel for the prisoner, but admitted.

Counsel for the prisoner tendered a power of attorney given by B. and Co. to the prisoner, dated 16th December in the same year. This was rejected.

On the admissibility of these two documents being reserved for the consideration of the Full Court,

Held, that averments made by a man at not too remote a period from the date of the transactions impeached may be given in evidence against him, and that the proof of debt of 26th July was therefore rightly admitted.

That the power of attorney, as being too remote, was properly rejected.

That these proofs of debt constituted a chain of evidence extending over the period within which the embezzlements were charged to have been committed, and that in the one objected to S. swore to transactions by the firm during the same period.

Conviction affirmed.

CASE stated for the consideration of the Judges of the Supreme Court by Mr. Justice Mein, pursuant to the provisions of *The Criminal Practice Act of 1865*, as follows:—

The prisoner was tried before me on the 31st May and the 1st June, 1888, at the present Criminal Sittings of this Court in Brisbane, on an information containing three counts, whereby he was charged with having (1) on the 15th March, 1886, embezzled £60 as clerk to Barron Lewis Barnett and another, (2) on the 3rd June, 1886, embezzled £330 as clerk to the same persons, and (3) on the 12th July, 1886, embezzled £120 as clerk to the same persons. The jury found him guilty of the charges contained in the first and third counts, and not guilty of the charge contained in the second count of the information.

The prisoner, several years ago, entered the service of Emanuel Barnett and Barron Lewis Barnett, who traded as merchants in Brisbane under the firm of E. Barnett & Co., and remained continuously in their service up to and throughout the year 1886. During the whole of that year he held the position of confidential clerk to the firm, and received for his services a salary of £300 per annum, paid by monthly instalments. Mr. Emanuel Barnett lived in England, and Mr. B. L. Barnett, the partner resident here, had the management and control of the business in Queensland, and the prisoner was "under his orders." The prisoner's duties, prior to May, 1886, were to keep the cash-book, to attend to all the banking accounts, to receive accounts when paid, to superintend all the clerical work in the counting-house, and to exercise a general superintendence and management over the secured customers of the firm. The cash-box was kept by Mr. B. L. Barnett up to May, 1886. Whilst it was so kept it was the duty of the prisoner, when he received any cash or cheque on behalf of the firm, to at once credit in the cash-book the customer who paid the cash or cheque with the amount so paid. It was then his duty to hand over to Mr. B. L. Barnett the identical cash or cheque so paid and credited. In May, 1886, Mr. B. L. Barnett ceased to keep the cash-box, and the prisoner was entrusted with the duty of keeping it and the firm's cash. Thereafter it was the prisoner's duty, after crediting customers in the cash-book with the cash or cheques paid by them, to pay all cheques and large amounts of cash to the credit of the firm of E. Barnett & Co. with their bankers.

The prisoner, on the 15th March, 1886, received on behalf of E. Barnett & Co. from one of their secured customers a cheque for £60, and, contrary to his duty, cashed the cheque at the bank on which it was drawn, and appropriated the proceeds to his own use, without either crediting the customer or debiting himself with the amount in the cash-book, or in any of the other books of the firm.

On the 12th July, 1886, the prisoner received from the same secured customer, on behalf of E. Barnett & Co., another cheque for £120, and, contrary to his duty, caused such cheque to be cashed at the bank on which it was drawn, and appropriated the proceeds to his own use, without either crediting the customer or debiting himself with the amount in the cash-book, or in any of the other books of the firm.

It is unnecessary to refer to the moneys mentioned in the second count of the information, as the prisoner, as already stated, was acquitted of the charge therein contained.

The prisoner's main defence to the whole information was that he was not a clerk within the meaning of the statute, but merely the financial agent of E. Barnett & Co.

There was no written agreement between the prisoner and his employers, and the evidence above stated as to his position and duties was given by Mr. B. L. Barnett.

During the trial, Mr. Chubb, Q.C., who prosecuted on behalf of the Crown, tendered as evidence in support of the

information:—(1) a proof of debt in the insolvent estate of J. M'Alpine, sworn and made by the prisoner on the 21st May, 1886, on behalf of E. Barnett & Co.; (2) a proof of debt in the insolvent estate of A. J. Bing, sworn and made by the prisoner on the 14th April, 1886, on behalf of E. Barnett & Co.; and (3) a preliminary proof of debt in proceedings for liquidation by arrangement or composition instituted by G. Chadwick the younger, sworn and made by the prisoner on the 26th July, 1886, on behalf of E. Barnett & Co. In each of these proofs of debt the prisoner deposed that he was a "clerk to E. Barnett & Co." The last-mentioned proof related to goods that had been supplied by E. Barnett & Co. to the debtor between 5th May and 26th June, 1886, and to promissory notes that had been made by the debtor in favour of E. Barnett & Co. between the 19th April, 1886, and the 14th May, 1886 The prisoner's counsel, Mr. Power, objected to the admission of each of the proofs. I overruled his objection, and admitted the three proofs in evidence. The proofs so admitted accompany this case.

Mr. Power tendered, as evidence on behalf of the prisoner, a power of attorney made by Mr. B. L. Barnett on the 16th December, 1886, in favour of his brother, Mr. E. M. Barnett, and the prisoner. By such power of attorney Mr. B. L. Barnett substituted. with certain exceptions, powers that by an earlier deed poll had been conferred on him by his partner, Mr. Emanuel Barnett, and conferred like powers, on his own behalf, on the same donees. The effect of the power of attorney was to repose on the prisoner and Mr. E. M. Barnett jointly, and, in the event of the absence, illness, or incapacity of either of them, but so long only as such absence, illness, or incapacity continued, in the other solely, with specified reservations, the management and control of the business of E. Barnett & Co., during the absence from Queensland of Mr. B. L. Barnett. The power of attorney accompanies this case. I refused to admit it in evidence, on the ground that it was irrelevant and could not affect the status of the prisoner on the dates mentioned in the information.

In my charge to the jury I told them not to regard the proofs of debt that were admitted by me as evidence of the character or capacity in which the prisoner was employed by E. Barnett & Co., but to treat them simply as evidence of the fact that the prisoner was in that firm's employment on the dates when the proofs were respectively made by the prisoner.

On the conclusion of my charge to the jury, the prisoner's counsel requested me to reserve the following questions of law for the consideration of this Court:—

(1) Was the proof of debt, dated the 26th July, 1886, properly received in evidence?

(2) Was the power of attorney of the 16th December, 1886, properly rejected?

I did not pass judgment on the prisoner, but postponed such judgment until the questions reserved had been decided by this Court, and I committed the prisoner to prison, and he now is in prison.

CHARLES STUART MEIN, J.

2nd June, 1888.

Power and *Lilley* appeared for the prisoner; *Chubb, Q.C.*, and *Real* for the Crown.

Power: The issue was, Was the prisoner a clerk on the date of the alleged embezzlement? Was he a clerk on 12th July? There should be no presumption in a criminal case. There was no objection to the two first proofs of debt that were put in evidence; but the third was remote, and the conviction therefore bad. *R. v. Gibson*, 18 Q.B.D., 87, *R. v. Fairie*, 8 E. & B., 486.

Lilley, C.J.: There is a chain of proofs beginning in April; one in May, and one in July. The two first lead up to the third; as links in the chain of proofs none of them is remote. We are unanimous against you on that point.

Power: As to the power of attorney of December, 1886, the Crown pressed their objection to its admission, and His Honor rejected it. If the document of 26th July was admissible, that one of December should also have been. There was some evidence that prisoner was probably a financial agent;—with more power than a clerk. It is no doubt a question of degree of remoteness.

Lilley, C.J.: We do not think the power of attorney was admissible; or that it would have served you, if admitted.

Lilley followed. The Crown asserted that on 15th March prisoner was a clerk, again on 3rd June, and again on 12th July. By way of showing that he was a clerk on 12th July, they put in a proof of debt sworn some days after that date in which he had admitted that he was a clerk. There was nothing in that proof to show that he knew anything of previous transactions; there was nothing in *The Insolvency Act* requiring him to know the business of the firm.

Mein, J.: Then how does a man swear that another is indebted to the firm of which he is an employé?

Lilley: If he could not do so, no more could an executor swear to the business of a testator who had carried on that business himself.

Lilley, C.J.: The executor would make his affidavit in proper form, no doubt. *The Insolvency Act* does not allow a man to swear a proof

of debt as of his own knowledge, when he actually does not know, but is merely informed. If prisoner swore falsely in this case, the affidavit may be bad under *The Insolvency Act;* still it is admissible evidence *per se* in this trial.

Chubb, Q.C., and *Real* were not called upon.

LILLEY, C.J.: The two points reserved for the prisoner have been put strongly by Mr. Power and Mr. Lilley. In this case, 1st, Was the proof of debt dated 26th July, 1886, properly received in evidence? That one only is assailed. In order to see whether it was properly received in evidence, there are two lines of circumstances, either of which, to my mind, would determine the admissibility of the document. The first is that between 15th April and 26th July there were a series of proofs, so to speak, in which the defendant swore that he was a clerk to Barnett & Co. Now the embezzlements were charged as having taken place on 15th March, 3rd June, and 12th July. The only one of those dates not within the period covered by these proofs, is that of 15th March, and that is before. With respect to the others, we may presume that defendant had continued to be a clerk during that period; and with respect to 15th March, we may presume that he was a clerk before, and continued to be a clerk after that date, since he swears that transactions of the firm in December, 1885, were within his own knowledge. The proof of 14th April contains the statement that the facts were within his own knowledge, and, notwithstanding that that averment is not in the proof of 26th July, yet, when a man swears to another's affairs, we must take it that they are within his own knowledge. We must take it that between these extreme dates of dishonest transactions, the defendant may be reasonably believed on his own oath to have been a clerk. I think that averments made by a man at not too remote a period from the date of the transactions impeached may be given in evidence against him. The question of remoteness is a subject for the judge, and he must consider it. I must take it that no such objection was raised here, and that, if it had been, my learned brother should have overruled it, because here the proofs are made at periods not too remote from the transactions which took place before 15th March, or just immediately before 12th July. On the ground that the extreme dates were not too remote either way, I must hold that the evidence was admissible.

From every point of view, there was a chain of circumstances deposed to by prisoner in these proofs which would strengthen the presumption of continuance, that is, that he was a clerk during the whole of the period sworn to in these proofs. In the first of them, that of 21st May, the prisoner Street swore that M'Alpine was indebted to Barnett & Co. in £26 odd, and that Barnett & Co. held securities for that, one dated so far back as 1st December, 1885, and the other being after March, 1886, and that the debt was incurred, and for the considerations above stated, within his own knowledge. Then there is a subsequent proof of 14th April, in which he goes further back still, and swears in 1886 that a man named Bing was indebted to Barnett & Co., to his own knowledge, so far back as 1st October, 1885. Then comes the proof of 26th July, on which the question of admissibility has been alone raised, and in which he says that he is a clerk as in the other proofs, and that George Chadwick is indebted to Barnett & Co. in £317. I think that, when a man swears to that, he swears from knowledge; it is not a proof from information and belief, but by one who knows. He may do so as one engaged in the business from day to day. In that, he goes back as far as April 19, setting out various securities, and the particulars of debts. That proof is admissible on two grounds, first, that it is not too remote from the other transactions, and second, that he deposes that he is a clerk. That status may most reasonably be presumed to have continued from 15th March to 12th July. Then this proof was rightly admitted. Founded on the previous proofs, it is the concluding link in a chain, of which the two previous proofs are links, and concludes the previous presumption, which the jury may take for a fact, that he was a clerk during

the whole period of the information, before and after those three dates, when he is alleged to have appropriated his masters' money. My learned brothers agree with me that the convictions must be upheld.

HARDING, J.: The prisoner was indicted for embezzlement; and, in cases of this crime, the law allows three separate charges to be proceeded upon in one information, so that there were at this time before the jury the charge of embezzlement on 15th March, 3rd June, and 12th July. As to each of these charges the evidence must be sufficient to convict the prisoner. The charge being for embezzlement, one of the issues must be, and was, whether at the time of the offences charged to have been committed, the defendant was a clerk to the owner of the property said to have been embezzled? This was in issue. Secondly, the prisoner raised the issue, that, if it was proved at any particular moment that the relation of clerkship existed, yet directly afterwards it had ceased to go on. In the course of the trial two documents were tendered, one of 21st May, the other dated 14th April. Now, these two documents were clearly admissible, without anything as to their contents, as to the embezzlements charged to have taken place on 3rd June, and 12th July. They were admissions of his status at the time just before those embezzlements. These were put in and contained on the face of them admissions by the prisoner, on the dates they were sworn, that he was a clerk —that that relation existed between him and the parties from whom the money was embezzled. Now, the first one, that of 21st May, being put in, it constituted the relationship, and from that a presumption arose that that relationship continued, until it was rebutted, and it at once threw the onus on the prisoner of rebutting that presumption. Then, the one of 14th April was put in, and it shows an admission of the relationship then, and raises a presumption that it existed and continued to exist. That one of 14th April strengthens the one of 21st May. So far, then, we have a relationship proved to exist on 21st May, and 14th April. Another document is then tendered, dated 26th July. But it must be remembered that the issue was that this relationship was presumed to continue until shown to have been put an end to. It is a contention in issue that he was a clerk, and, this being put in, it goes to strengthen the presumption that the relationship continued right through. On that ground alone I think it was receivable. That would go only as to the acts charged on 3rd June and 12th July. So far as that goes, I do not think there can be the least possible doubt as to its admissibility, nor am I going to throw any doubt on it, because they were rightly admitted. In these documents, the deponent acknowledged himself at the time to be a clerk. He speaks of his own knowledge, because a man making an affidavit always speaks of his own knowledge, unless he qualifies it by showing the sources of his information. He omits here to give any sources of information, and does it at his peril, and it would be for a jury, on an indictment for perjury, to say whether he did so wilfully, But here, speaking without qualification, he asserts that he knows the facts stated therein. If he did, these dates run back behind 15th March, and running back as they did, it was a question for the jury to say: Do we believe what this man then swore on his oath; that he knew in connection with Barnett's business these facts stated? If not, we must believe that he was intentionally swearing falsely. That was a question for the jury, whether or not they gave credence to what was laid before them. If they did, why, from that, though not direct evidence, it was a circumstance from which they were entitled to infer that he was a clerk during that period. So that I think the documents were properly before the jury as to each charge of embezzlement then being tried. Then it was said that a document tendered by Mr. Power, on behalf of the prisoner, was improperly rejected. This document was dated 16th December, 1886. As compared with the dates of the embezzlements charged, I think that document was properly rejected. I need not give further grounds for my judgment.

MEIN, J.: I concur.

LILLEY, C.J.: Our answer, then, to the first question is, Yes; and to the second, Yes. The convictions are affirmed, and the prisoner is ordered to be brought up for sentence before our brother Mein on Wednesday morning.

Solicitors for prisoner: *Chambers, Bruce & M'Nab.*

Solicitor for prosecution: *Crown Solicitor.*

In the matter of GEORGE E. COOPER, A SOLICITOR

4 QLJ 49

In this case the solicitor had received a sum of money for the purpose of completing the purchase of land by his client, and of obtaining a transfer of same. Owing to difficulties in connection with the title, delay occurred. The transfer was not completed. The day before the application to make absolute the rule *nisi*, he repaid the amount received by him, with interest, to his late client.

Held, that the solicitor deserved censure; but, as it was the first complaint against him, and as he had repaid the money, the Court would not fine him, but ordered him to pay all costs of the proceeding.

ORDER *nisi*, granted by the Court on 13th March, 1888, upon the motion of *Lilley*, for the Queensland Law Association, calling upon the solicitor to show cause why he should not be struck off the roll of solicitors.

The rule was made returnable on 8th May, but an extension was granted on that date by the Court until 8th June.

The facts were shortly as follow:—James Tougher purchased in April, 1885, from John Wileman, two allotments of land for £80, on the terms of £5 in cash, and the balance in monthly instalments of £3 2s. 6d. each. He paid these instalments until they amounted to £57 7s. 6d. In September, Cooper wrote to Tougher informing him that Wileman had transferred his interest in the land to one Slaughter. Tougher came from Marble Island, near St. Lawrence, to Brisbane, and paid Cooper £22 12s. 6d. to pay the balance due on the land, and to obtain the transfer in his favor; Cooper gave him a receipt for the money in the following terms:—"Received from Mr. James Tougher £22 12s. 6d. to be returned if transfer not completed. George E. Cooper." Tougher returned to Marble Island, but heard nothing from Cooper about the land. In May, 1887, he came to Brisbane, and called on Cooper, who told him "the transfer had not been signed owing to some difficulty that had arisen, that he was about leaving Brisbane for Croydon," and, in Tougher's presence, "instructed his clerk to get the transfer completed," and promised, if the transfer was not completed, that he would return the £22 12s. 6d., and £2 for which he had not given a receipt. In November, 1887, Tougher again came to Brisbane, when Cooper's clerk informed him that he had written to Slaughter, then in Maryborough, and had received a reply from the latter that he would see about the matter on his return to Brisbane. In February, 1888, Tougher himself saw Slaughter, and was told by him that, having been unable to obtain the money from Cooper for the balance of the purchase money, and the conditions of purchase not having been fulfilled, the agreement for purchase had become void, the purchase money already paid was forfeited, and that Tougher had no claim on him. In November, 1887, Tougher having made a complaint against Cooper to Mr. Osborne, he, as Secretary of the Queensland Law Association, wrote on 29th November to Cooper demanding an explanation. On 4th February, 1888, Cooper replied by telegram, stating that the £22 12s. 6d. would be wired to Mr. Osborne's credit on the following Monday. The money not having been sent, Mr. Osborne wired back to Cooper on the 8th,—"Has money been wired, if so, to what bank?" On 20th of the same month Cooper replied—"The amount will be placed your credit Bank of New South Wales on Monday." Up to 11th March, the money had not been so placed to his credit by Cooper.

Cooper, in his affidavit, sworn after service of the rule *nisi*, deposed that there was great difficulty in obtaining the title to the land, owing to the land being mortgaged at the time of the sale to Tougher, and also owing to Wileman having sold the property to Slaughter. He left instruc-

tions with his clerk as to proceeding in the matter, and soon after arriving at Croydon, until communicated with by Mr. Osborne, he had heard nothing further. His reply to Mr. Osborne had been delayed through illness. He had not known the matter was still unsettled; and had been always ready and willing to pay Tougher his money. In other affidavits sworn on his behalf, it was stated that Tougher had left an agent in Brisbane named Dillon, who had been regularly informed as to the state of the case. In August and September, his clerk had informed Cooper by letter that the transfer was not completed. The clerk, moreover, deposed that Tougher had never made any demand for repayment of the £22 12s. 6d.; but that he had paid Tougher on 4th June the £22 12s. 6d., and £2 paid on account of costs, with interest to date; and that Tougher had informed him that he had the title to one piece of land.

Lilley appeared on behalf of the Law Association; and *Real* for the solicitor.

Real submitted that the solicitor had been guilty of negligence; the money had been paid.

Lilley: The Association did not wish to force the matter, and did not ask for an extreme penalty; but the solicitor should be made to pay all costs.

LILLEY, C.J.: We do not like this transaction. The solicitor deserves grave censure, and we do censure him. Under the circumstances, as he has paid the money, and as it is the first occasion on which a complaint has been made against him, we will not fine him, but he must pay the costs as between solicitor and client within one month of taxation. If not then paid, he is to be suspended from practice until payment.

Solicitor for Association: *Osborne.*

Solicitor for Solicitor: *Bernays.*

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4 QLJ 210

1906 St R Qd 135

1910 St R Qd 245

1917 St R Qd 17

ELLIOTT *v.* GILCHRIST, WATT AND CO.

Contract—Evidence of.

In an action for damages for breach of a contract to drove cattle from defendants' station in Queensland into New South Wales, the plaintiff relied upon an alleged parol contract made between him and the defendants' station manager.

The defendants' case was, that the manager had no authority to employ the plaintiff. No evidence was adduced as to what were the duties of a station manager.

The only evidence as to authority was that of one of the defendants, namely:—"Subject to our approval, Mr. Munro would have authority to make arrangements for the transportation of cattle. It would be necessary for him to communicate with us on all occasions." "Mr. Munro had general authority to employ men for the ordinary work of the station. Gilchrist, Watt & Co. reserved to themselves the right to remove any one from the station whom they had reason to disapprove of."

The jury found that there was a complete contract.

Held (Lilley, C.J., dissenting) that, there was not sufficient evidence to support the finding of the jury.

THIS was an action for £364 damages for breach of a contract to drove cattle from defendants' station in Queensland into New South Wales. The action was tried at Maryborough, before His Honor The Chief Justice and a jury of four, on 28th April, 1888.

Plaintiff set up, as a written contract, a letter from defendants to him, asking him to go to their Boondooma Station, to take charge of and drove a mob of cattle:—

> Referring to our instructions to you in ours of 14th inst., addressed to Nundle, we are advised by Mr. George Munro that he will not require you to call at Tabulam for bulls. Therefore proceed direct back to Boondooma, where we have about 1000 store bullocks we wish you to bring across to Goonal Station, near Moree.

This was abandoned at the trial; and plaintiff's counsel relied upon a parol contract, alleged to have been made between himself and Munro, defendants' manager at Boondooma, during a conversation between them. Evidence of the conversation was given by plaintiff and a witness named Perry, and by Munro. Plaintiff's evidence, supported by Perry's, was that he submitted three sets of terms on which he would drove the cattle in question; that Munro "said first he would submit the terms to Sydney,

and then he said he had instructions to make the terms to best advantage," and that he accepted one of the proposals. Munro swore that he said, when he got the proposals, that he would submit them to Sydney; that he received them to be submitted to Sydney; that he did submit them to Sydney; and did not accept any terms himself. These were all the witnesses called. No evidence was specially adduced as to what were the duties of a station manager. The only evidence bearing upon that point was that of one of the defendants, J. B. Watt, taken on commission, in the course of which the following passages occurred:—

Subject to our approval, Mr. Munro would have authority to make arrangements for the transportation of cattle. It would be necessary for him to communicate with us on all occasions.

Mr. Munro had general authority to employ men for the ordinary work of the station. Gilchrist, Watt and Co. reserved to themselves the right to remove any one from the station whom they had reason to disapprove of.

There was evidence also on both sides that Munro had engaged the plaintiff to drove horses and bulls, without authority from his principals in Sydney.

The following letter and telegram were put in evidence:—

3rd August, 1886.

Messrs. Gilchrist, Watt and Co., Sydney,

Elliott arrived with the bulls yesterday; they are a very good lot, the best we have had here since the Chisholm and Lee ones.

I have got Elliott to give me the terms on which he will take 1000 bullocks south. He makes three propositions. I think No. 3 would be the most satisfactory for all parties, and would make no difference if cattle were sold on the road. I hope to hear you have sold the bullocks on the station. * * * * Kindly wire me *via* Gayndah on receipt of this which you think the best arrangement to make *re* droving.

G. MUNRO.

9th August, 1886.

To Geo. Munro,

Boondooma, Gayndah.

Trying sell bullocks delivery yards failing sale intend despatching Derra prefer Elliott's second or third proposal according to distance which you know.

GILCHRIST, WATT & Co.

Before the mustering of the cattle in question could be completed, the defendants sold them in Sydney, and so informed Munro, who wrote to plaintiff, saying the cattle were sold, and that plaintiff's services would not be required.

The defendants made a counter-claim in respect of some cattle left behind by plaintiff during a previous droving trip.

The jury found that (1) there was a complete contract, and (2) a breach by the defendants, and (3) for £100 damages; and found for the plaintiff on the counter-claim. His Honor gave judgment for plaintiff for £100.

On 8th May, *Real*, *Lilley* with him, moved and obtained a rule *nisi*, returnable next Full Court, to set aside findings, and judgment entered for plaintiff, and to enter judgment for defendants, or why a new trial should not be granted, on the grounds, (1) that the verdict was against evidence, and (2) that there was no evidence to support the first finding.

On 5th June, *Real*, *Lilley* with him, appeared; on behalf of defendants, to move the rule absolute, *Chubb*, *Q.C.*, *Power* with him, for the plaintiff, opposed.

Judgments were delivered on Thursday, 7th June, as follow:—

HARDING, J.: This was an action in which Percy Elliott was plaintiff, and Gilchrist, Watt and Co. were defendants. The action was tried before His Honor The Chief Justice at the last Maryborough Sittings of the Circuit Court, and on that occasion judgment was entered upon findings of the jury in answer to certain questions. The defendants are now moving to set aside the verdict, so far as it answers to those questions, and to enter judgment for them, or for a new trial. As I understand the case, the action was brought by the plaintiff for a breach of contract for droving. That contract was doubtless intended to have been proved by means of two letters, dated 14th and 17th June. The Judge, at the trial, directed the jury, and it was entirely for him to direct them on the construction of a written contract, that by virtue of these documents no contract was entered upon. I entirely agree with that direction. That being so, the trial went on, and the plaintiff hung his case upon a contract which he alleged to have been made by parole between him and the manager of defendants

station, named Munro, in the presence of another man named Perry. The jury believed that that contract was actually made, and, so far as that goes, I am not at issue with the jury. I think there was ample evidence for them to come to a conclusion one way or the other. There is nothing there for me to touch. The question was in this case, as in others, whether there was evidence before them from which reasonable men could arrive at a conclusion. Was there receivable evidence, properly received, which could be weighed by them? So far, the matter stands: there was a contract. Behind that, there was the question, Munro having entered into the contract, was he the agent to enter into this contract for Gilchrist, Watt and Co.? That was at issue at the trial. The moment that became an issue at the trial, the burden of proof lay upon the party asserting the agency, that is to say, it lay upon the plaintiff. The evidence which he called has not been brought before my attention. I should have expected to find some evidence given to show what is the ordinary course of business in station management, and when a man appoints another man as his manager what powers he confers upon him by that simple appointment. As far as I can see, no evidence whatever was given to show that. Then, *e converso*, in the evidence on commission, Mr. J. B. Watt says Mr. Munro had general authority to employ men for the ordinary work of the station, but that Gilchrist, Watt and Co. reserved to themselves the right to remove anyone from the station of whom they had reason to disapprove. Well, so far as that bit of evidence goes, it shows what special authority was given by the defendants to their agent, Munro. There is no authority pointed to for the employment of men outside the station. It is an authority to employ men for the ordinary work of the station. Beyond that, they reserve to themselves the right to remove anyone from the station whom they have reason to disapprove of. If that confers any authority to the manager to employ a drover, they do not reserve to themselves any power to disapprove of the drover, because they could only remove men from off the station. Then, again, he says, "subject to our approval, Munro would have authority to make arrangements for the transportation of cattle; it would be necessary for him to communicate with us on all occasions." Now, the transportation of cattle certainly does not mean the ordinary mustering of cattle upon a station, removing them from one stock-yard to another. To transport would be to move them from one place to another. If that is a right meaning of the phrase, Munro had no right to make arrangements unless they were communicated and approved by the defendants. So far as the evidence goes, it seems to me to be all on one side, and all opposed to the view, that there was power in Munro to make contracts for droving. Again, it was argued that the plaintiff was sent up by the principals to this place, with the view of engagement. That would be putting it in the strongest way, but even if it was with a view to engagement, then the engagement would still have to be entered into in the legal and proper manner, and it would be for Munro to see whether or not the contract was properly entered into. It was further argued that plaintiff went up under those terms, and whilst there, Munro engaged him with respect to the droving of some horses. That was used to show that, at or about the time this contract was entered into, Munro was making similar contracts on the station, from which this man was entitled to infer that Munro had general authority to enter into contracts for droving. Supposing that was so, and he did enter into this contract for droving, in order to make it usable against the defendants by way of estoppel, which, without actual authority, would be the only way to appoint them, it would have to be shown that Munro's acting without their authority had been brought to the knowledge of the defendants, and had been approved of by them. No evidence of that was brought to my attention, as having been adduced, to prove these matters to the jury. I think, in this case, there was no such evidence as to justify the verdict, and, upon the whole, I think the rule must be made absolute.

MEIN, J.: I have arrived at the same conclusion in this case as my learned brother. With respect to the contract itself, it appears to me that there was evidence before the jury as to the actual making of it, on which they, as reasonable men, could come to the conclusion that it had been really entered into. It is possible, if I had occupied the position they did on that occasion, that I might have come to a different conclusion; but it is the province peculiarly of a jury to weigh the value of evidence, and, if any evidence is forthcoming on which reasonable men might act, the Court will not interfere with the verdict arrived at upon that evidence. Here the jury had evidence on which they could come to the conclusion they did. The question remains, as that contract was executed by an agent, had that agent authority to enter into it? Or, if there was no such authority, was the contract ratified subsequently by the defendants? The contract having been made by an agent, it rested with the plaintiff to prove that that agent was acting within the scope of his authority when he made it. The agent here occupied the position of manager of the station from which the cattle in question had to be transported to another place by the plaintiff. No evidence appears to me to have been produced to show what was the ordinary course of business, and what were the ordinary duties of, the manager of a station of the character of the station in question. If any evidence was produced at all, it appears to me to go to show that it was not within the scope of a manager's duty on a station to employ drovers to take cattle from it to places beyond it. The only evidence as to the position of a manager was that of J. B. Watt, one of the defendants. In cross-examination he defined what the duties of a station manager were. In an earlier part of his evidence, he stated, as a general proposition affecting station managers,—

Subject to our approval, Mr. Munro would have authority to make arrangements for the transportation of cattle. It would be necessary for him to communicate with us on all occasions.

That, as I read it, is a general proposition applying to Mr. Munro, *quâ* the manager of a station. In a later part of the same cross-examination, the same witness gives further particulars of the authority. They were—

Mr. Munro had general authority to employ men for the ordinary work of the station. Gilchrist, Watt and Co. reserved to themselves the right to remove anyone from the station whom they had reason to disapprove of.

Now, as I have already stated, there is no direct testimony produced on the part of the plaintiff to show what the ordinary duties of a manager of a station were. Here Watt says Munro's duties were, at all events, restricted to a general authority to employ men for the ordinary work of the station. It appears to me that the only reasonable and obvious construction to put on these words is that, so far as concerned the hands employed to carry on the work of the station, Munro, as manager of it, had authority to employ them, subject of course to the masters' right to dismiss any person guilty in their opinion of misconduct. There was no evidence that it was part of the duties of a manager to contract with, and appoint men for, the transportation of cattle from that station to anywhere else; and I do not think it would be within the scope of a manager's authority to make any such arrangement. Undoubtedly the ultimate object of a cattle station—it is not shown what class of station this was, but assuming it was a cattle station—would be the disposal of the produce of that station for the benefit of the owners. But surely to decide upon such a question as the disposal of a very material portion of that produce would not be for the person carrying out the details of work on the property, but such a matter would be one on which his principals, the owners of the station, should be referred to, before any action was taken. It has been urged, in the course of argument, that apart from this testimony of Watt, there was some testimony which would have the effect of showing that Munro had implied power to act on his own authority.

This evidence was that, without authority from his principals, an engagement had been made between the plaintiff and Munro, in his own name, and not for the defendants. Other evidence was that, after the contract in question here had been entered into, plaintiff had been employed, while waiting further instructions with regard to it, that he received a request from Munro to bring some horses from Gladstone to the station in question. As my brother Harding has pointed out, no evidence in this case has been brought under our notice, that this engagement had been brought under the notice of defendants, and ratified by them. Supposing they had ratified it, how can it be urged that the effect of such ratification, after their contract now sued on was concluded, was a holding out to the plaintiff, before it was entered into, that there was authority in Munro to enter into engagements at his discretion? I cannot see that the making of such engagement can have weight on plaintiff's behalf, or assist him in the least here. Then it was urged that the defendants subsequently ratified the contract which Munro had entered into here. That ratification was said to be embodied in a telegram from defendants to Munro. Now that telegram is in reply to a letter written by Munro to defendants. In order to arrive at the meaning of the telegram, it must be read in connection with the letter. The letter purported to inform defendants that a proposal had been made by plaintiff, not that a contract had been entered into. In the letter Munro had suggested that certain action should take place, supposing such a contract should be entered into. He had advised his employers that they should not drove the cattle away from the station, but should endeavour to sell them on the station. They reply as follows:—

Trying sell bullocks delivery yards.

Meaning they were endeavouring to sell on the station—

Failing sale intend despatching Derra prefer Elliott's second or third proposals according to distance which you know.

That is, failing carrying out the ideas suggested by Munro, that they would then send the cattle in question to Derra, and that of the proposals made by Munro, they preferred the 2nd and 3rd. In order to have a ratification of a person entering into an engagement on behalf of others, the persons ratifying must have complete knowledge of the materials affecting the contract. Here, instead of that, the defendants' knowledge was quite the reverse. There is no evidence that at any subsequent time the defendants ratified the contract; on the contrary, from first to last, the defendants distinctly repudiated any exercise of authority by Munro. There was then no evidence on which the jury could come to the conclusion that Munro had either implied or special authority to enter into a contract on behalf of the defendants, or that there was any ratification by the defendants of such a contract. Under these circumstances, I agree with my learned brother Harding that the verdict must be set aside.

LILLEY, C.J.: I have the misfortune to differ from my learned brothers. I am afraid, if there was no evidence for the jury, I must fall under the imputation of unreasonableness. At all events, I agree with my brother Harding as to the question of practice. If, on a trial in the Court below there has been a body of evidence which the Court here, on a motion to set aside the verdict, thinks has brought out all that is likely to come out of the transactions between the parties, this Court may enter what it believes to be the proper judgment, and not send it back for trial. In this case the majority of the Court decides that this case should be sent back. I think, however, that it ought not to go back at all. The questions here, as in the Court below, are two. The first is, Was the contract made in fact? On the trial I put the question to the jury, Was there a complete contract? which included the preliminary question, whether the party making the contract had authority to enter into it on behalf of the defendants. Now, what are the functions of a jury? They are the judges of the facts. There must be facts before them from which reasonable men may come to the conclusion which they pro-

fess to have come to. In coming to that conclusion it is not incumbent on a jury, unless conscientiously satisfied of the fact, to believe any portion of the evidence. They may sift the evidence, and may disbelieve all the evidence for the plaintiff or for the defendant, or may believe the whole of the evidence for either party, and may disbelieve any particular portion of that for the other party. So, in considering this matter, we must not take it that the jury, in their room, believe all that the defendants or their witnesses swear, or any particular part of it. If within the body of evidence, either for the plaintiff or for the defendant, there is any part on which the verdict of the jury could be fairly rested—although there might seem to be overwhelming testimony against it, still, they might disbelieve what seemed overwhelming, compared with that on which their verdict could be rested,—I think the jury's verdict should be upheld. We go beyond our function, if we count up and weigh the materials on which the jury found their verdict. To this extent we have said we will weigh it,—if it was such a *scintilla* of evidence, that no reasonable man could come to the conclusion that they came to, the Court should say the case must go back for trial, or must enter a verdict for the party in whose favor they failed to find it. I think here there was some material on which the verdict of the jury may be maintained. I do not say it is very strong—I would, if I entered into that question, be weighing the evidence as against the verdict. There is material for a verdict on either side; there is material for selection according to the consciences of the jury. As I said, they may have disbelieved all the material, on which comment has been made in favor of the defendant. It might all be true, and, if true, might produce an overwhelming case in favor of the defendants, but it might not be so considered by the jury. The facts of the case are these, on which I found my judgment in favor of the verdict:—The plaintiff was a drover, and had received two letters before getting to the station to undertake this work. He was told, we wish you to do this work, and he was referred then to Munro, who was manager of defendants' station. Now, I take it, that the jury might have believed this portion of evidence which was taken on commission. Munro had general authority to employ men for the ordinary work of the station. They might believe that, and they might disbelieve the reservation of power in Gilchrist, Watt & Co., to discharge men. They might believe or disbelieve that Gilchrist, Watt & Co. had reserved for themselves to make arrangements for transportation of cattle. I do not think, if they did believe it, that it would interfere with a general authority to employ men for the work of the station. Speaking without the evidence, I should require something to show what is the general work of a station. But if exercising common sense, and speculating on what might be a common-sense view, as a jury, I should say the ordinary work is not confined to the station of itself, but embodies the whole work of the station,—breeding, rearing, and delivery of stock when sold. The case does not rest wholly on that, because then, I think, there should be something more beyond the local knowledge of the jury, to show what is the ordinary work of a station. The work of a station, I would say, includes delivery and removal of cattle by sale or otherwise. Otherwise the station must become overstocked. That must be part of the sensible working of a station. But here there was evidence. In fact it appears, from what my brother Mein said, that cattle were sold and delivered off the station, because there was a change afterwards at the suggestion of Munro, that instead of sale for delivery off the station, the cattle should be sold to be taken by the purchaser on the station. There was evidence that delivery off the station after sale was part of the business. Well, then, the manager had general authority to employ men for the ordinary work of the station. He, in pursuance of that general authority, made the contract which the jury found he had. Whether the jury might not have come to a different conclusion, it is not for me to say, because, if a new trial be had any-

thing said here might have weight for one side or the other. If I had been sitting as a juryman, I might have come to the conclusion my brothers have, but, if my brother jurymen had formed a different view, I might have thought there was ground for them to come to such a view. There is a transaction which points to what was a part of the ordinary work of the station. I think there is a fair ground for concluding that the delivery of cattle would be part of the business, or ordinary work of the station. Then there would be men employed for it, as work of the station, that is, incident to running the station; and a drover would be an essential hand for the delivery of cattle to purchasers. There is a piece of evidence that shows that. It may be one instance only, but that for the jury may be enough to show what is the work of the station. That is the evidence of the plaintiff himself. Whilst these cattle were being gathered up and mustered there is the evidence of plaintiff himself being sent to Gladstone to drove horses. He was employed to drove them from Gladstone to the station. That, to my mind, goes to show that the jury might fairly find from that instance of independent action by Munro that he had authority to employ a drover to drove. It was uncontradicted by defendants. If in that instance he did it simply because it was within the scope of his general authority to employ men for the ordinary work of the station, I think there was evidence on which the jury might have found there was authority. That is my view of the matter, but as my brothers think otherwise, to whom I defer, there must be an order for a new trial. The order will be,—Verdict and judgment set aside on the ground that there was no evidence to support findings, with costs of motion. No order as to costs of each trial.

HARDING, J.: I may say that I entirely agree with my learned brother The Chief Justice's exposition of the duties of the jury.

Solicitors for plaintiff: *Chambers, Bruce, & McNab*, agents for *Power*, Gympie.

Solicitors for defendants: *Hart & Flower*.

AUGUST SITTINGS OF THE FULL COURT.

Post p. 140.
4 Q.L.J. 41.

In the matter of ORMOND O'BRIEN.

Solicitor—Admission of—Reg. Gen., 12th Dec., 1879—Evasion of Rules.

A clerk, intending to be articled, having applied for exemption of two years' service under his articles on the ground that he was a graduate of the Sydney University, and, having been refused such exemption, went to Sydney, and was there admitted as a solicitor after three years' service under articles.

Held, that, under the circumstances, he was not entitled to admission here, until he had completed his full term of five years' service.

Lilley moved the admission of Mr. Ormond O'Brien, a solicitor of the Supreme Court of New South Wales, as a solicitor of this Court. Mr. O'Brien had not the certificate of the Board of Examiners for Solicitors.

MacNaughton appeared, on behalf of the Board, to oppose.

Mr. O'Brien was, until July, 1884, in the office of Messrs. Foxton & Cardew, solicitors, Brisbane. On 29th April, 1884, he enquired from the Secretary of the Board of Examiners, whether he, as a graduate of Sydney University, could not obtain exemption of two years' service out of five under articles prior to admission as a solicitor, according to the provisions of *The Sydney University Act*. He was informed that, under the rules, he could obtain exemption from the preliminary examination; but that the Board had been informed "that the judges had no intention to extend the privilege of so short a period of service to graduates of any University."

In July, 1884, Mr. O'Brien left Brisbane, and went to Sydney, where he entered into articles of clerkship with his brother, Thomas Ormond O'Brien, solicitor, and served thereunder for three years, and having passed the necessary examinations, was admitted by the Supreme Court of New South Wales on 24th March, 1888. He returned to Brisbane on 2nd April following, and on 14th May re-entered the office of Messrs. Foxton & Cardew as a clerk.

He applied to the Board for a certificate of fitness for admission in this Court, as a solicitor

of New South Wales, and was refused on the ground that the said Board of Examiners had been informed by him in May, 1884, that he proposed entering into articles of clerkship for three years only, as he was Bachelor of Arts of the University of Sydney, and on the authority of *The University Act of 1857*, and that it appeared that he could not have served a full term of five years, and that the said Board was of opinion that his application for admission as a solicitor was an evasion of the rules of this Court for admission of solicitors.

Lilley: Mr. O'Brien was entitled to admission under Rule 17. His going away and obtaining admission in New South Wales was not an evasion of the rule. His case was not analogous to either *Mackay's case*, 2 Q.L.J., 178, or *Bannatyne's case*, 3 Q.L.J., 75, or to *Morrice's case*, 2 Q.L.J., 69. It would become necessary to enquire into the term of service elsewhere in every case of application for admission; to go behind a certificate of admission in another court. In the case of New South Wales solicitors, there were two modes of educating solicitors; and there was nothing to indicate that one secured a better educational status than the other. There were two modes of educating men for the same profession. If a distinction were made between two classes of applicants, it would virtually do away with reciprocity.

LILLEY, C.J.: We cannot grant the admission.

In the matter of VADE THOMAS KESTERTON, A SOLICITOR.

Solicitor—Misconduct of—Misappropriation of trust funds.

Lilley, on behalf of the Law Association, obtained, on 5th June, a rule *nisi*, returnable at the next sittings of the Court, calling on Mr. Kesterton to show cause why he should not answer charges of misconduct, or why he should not be struck off the rolls, and why he should not pay costs of the rule.

The misconduct charged occurred under the following circumstances:—The beneficiaries, in England, under the will of William Wilson, late of St. George, sent Kesterton, then practicing at St. George, a power of attorney, authorising him, *inter alia*, to receive the proceeds of the administration of Wilson's estate from, and to give a release to Lamb, the administrator. In January, 1886, Kesterton received from Lamb the sum of £349 3s. 1d. on behalf of the beneficiaries, and gave him a receipt for the money, and the indenture of release. Kesterton had not paid the beneficiaries any of the money so received; and had not offered either Lamb or their solicitor any explanation of his failure to do so, though frequently asked for one.

On 6th August, *Lilley* moved the rule absolute to strike off the rolls, upon affidavits setting out the circumstances; and an affidavit of service of the rule *nisi* on Kesterton.

There was no appearance for Kesterton.

LILLEY, C.J.: Let Mr. Kesterton be struck off the rolls, and pay the costs of this proceeding forthwith.

Solicitor for Law Association: *Osborne.*

REGINA *v.* KNACK.

TOOWOOMBA CIRCUIT COURT, CRIMINAL } 11th July, 1888.

HARDING, J.

Information for infanticide—Two counts—Information quashed—Second information—Sex of child unspecified—Information quashed—Third information—Amendment of amended information.

Chubb, Q.C., for Crown, presented an information against Ellen Knack, containing two counts, (1) that she had murdered a male child, (2) that she had murdered a female child.

Macnaughton, for prisoner, objected to double count.

Harding, J., ordered the information to be quashed. *Archbold, 19th Ed., 49.*

Chubb, Q.C., then presented an information against the prisoner for the murder of a child, name unknown.

Macnaughton objected to the information, on the ground that the sex of the child should be stated; and, if that objection be overruled, on the ground that there should be some allegation in the information that the sex was unknown to the Prosecutor.

Harding, J., intimated that he did not consider mention of the sex absolutely necessary if unknown.

The information was quashed on *Chubb* consenting to *Macnaughton's* application.

Chubb, Q.C., then presented an information for the murder of a female child, name unknown.

Macnaughton objected on the ground that the Court had no power to amend an amendment. *Archbold, 19th Ed., 225.*

This objection being overruled, the trial proceeded in the usual course, and prisoner was acquitted.

Solicitor for prisoner: *Murray*, Toowoomba.

IN INSOLVENCY.

LILLEY, C.J. 25th July, 1888.

In re HORACE CHARLES RANSOME, AN INSOLVENT.

Insolvency Act of 1874 (38 Vict. No. 5), Sec. 168, Subsec. 2—Certificate of Discharge—Books of Account.

Under subsection 2 of section 168 of *The Insolvency Act*, the grant of a certificate of discharge is not a matter of right. The Court will require evidence that the insolvency was brought about by circumstances beyond the control of the insolvent, and for which he cannot be justly held responsible. The unsuccessful prosecution of an action is not in itself such a circumstance. A certificate will not be granted to a tradesman in the absence of proper books of account.

THIS was an application on behalf of the insolvent for his certificate of discharge, under subsection 2 of section 168 of *The Insolvency Act of 1874.*

Insolvent had been adjudicated on his own petition on 17th December, 1884. His assets realized £19 12s. 3d.; and the total amount of debts proved against the estate was £304 14s. 8d., of which £222 11s. 2d. were the taxed costs of an action in which the insolvent had been unsuccessful.

Drake appeared on behalf of the insolvent; the trustee was present in person.

The facts of the case appear in the judgment.

LILLEY, C.J.: In this matter, the insolvent has applied for a certificate of discharge under the second subsection of section 168 of *The Insolvency Act*, which enacts that a certificate may be granted by the Court at the expiration of two years, without the consent of any creditor. I gave the insolvent an opportunity of applying to his creditors. So far he has been unsuccessful in obtaining their consent to his discharge. Now there are several previous decisions in this Court which govern the course of a judge in the administration of this subsection, and it has been decided that, on an application under this subsection, some evidence is necessary to show that the insolvency has been brought about by circumstances beyond the control of the insolvent, and for which he can

not be justly held responsible, and the grant of a certificate of discharge after the expiration of two years is not a matter of right in the insolvent. The insolvent has filed affidavits, in one of which he sets out the cause of his insolvency—some unsuccessful litigation upon which he entered—and it appears that, with the exception of about £70, the debt which he incurred by reason of that litigation is the main portion of his indebtedness. It has been decided in this Court, and in England, very recently that the unsuccessful prosecution or defence of an action is not alone sufficient to satisfy the Court that the insolvency has been brought about by circumstances beyond the control of the insolvent. I should not be disposed to press in this case very hardly against the insolvent the fact of his unsuccessful litigation. I know in England, where it is required by statute that the insolvency should be brought about by misfortune, and not by any fault of the insolvent himself, it is regarded as an absolute bar; but I think there are cases where a man might enter upon litigation, and might not incur the absolute censure of the Court when he has been unsuccessful; so that I have always held in reserve a discretion, if I thought fit, to grant the certificate. Therefore in this instance I should not be disposed to press that matter hardly.

But there is a more serious matter in this case, and I shall deal with it exclusively upon that matter. There is one passage in the report of the trustee which is of grave importance, so far as the insolvent is concerned. The trustee says—

> the books produced by the insolvent entirely fail to show a record of his business transactions at the time of his insolvency and previously. The ledger has only seven accounts in it which show recent transactions, and these do not in the slightest manner explain the cause of his insolvency. Several of the pages of the ledger have been torn out. There is absolutely no record of his cash receipts and expenditure, and the Bank Pass Book shows that the balance to his credit on the 2nd day of November, 1884, forty-five days before his insolvency, was transferred to a new account, called "Trust Account."

It is obvious, therefore, that if the insolvent ever did keep proper books of account he has not produced them to his trustee or creditors. He accounts, I may state, for the mutilation of his books by saying they were blank pages, and might have been torn out to make up accounts. That is not a satisfactory explanation; but the main thing against him is that he has not kept books of account, by which the trustee might have discovered the course of his business, and no cash record of receipts and expenditure.

Now it has been authoritatively laid down in this Court, not once, but repeatedly, that where the insolvent comes forward stating, as he must, because the burden of proof is on him, that the insolvency has arisen from circumstances for which he should not be justly held responsible—caused by misfortune and not from fraud or misconduct—he

> must satisfy the Court, by something like proof in the shape of contemporary record, that what he is stating is the truth, and that he is entitled to relief. *In re Dunn*, 1 Q.L.J. 80.

Now we have no contemporary record at all here to satisfy us that his insolvency has arisen from misfortune—no evidence whatever,—and it has been laid down in this Court, *In re Durant*, October, 1886,

> that a tradesman who does not keep books should never receive a certificate.

I am bound by that decision, and I think it a reasonable and a just one.

Then there is a further circumstance to which I must advert: the trustee, as we have seen, has reported that there was a balance to his credit at his bankers of £45, which before his insolvency he transferred to a new account, called a trust account. The insolvent says he was advised by his banker to change that to a trust account; but he gives us no information whatever as to the nature of the trust for which he held it, or what became of it. That is also a most unsatisfactory state of affairs; and upon that, and upon the absence of proper books of account, showing anything in fact that would enable us to get light upon his dealings and transactions, I am bound, I think, to act.

The creditors have rendered no assistance in this matter. It is a curious, and I think rather unfor-

tunate, result of the legislation of 1874—our present *Insolvency Act*—that creditors seem to have lost all interest in the behaviour of their debtors. They never come, either to oppose or in any way to assist the Court to come to a conclusion as to the propriety of refusing or granting the certificate. I might almost say shoals of insolvents are passing through the Court yearly; and the creditors, who are most deeply interested in the realization of the estates and in the honest transaction of business in the colony, give the Court no help, but throw the whole responsibility upon the Court to ascertain whether the insolvent is worthy of a certificate of discharge. I think it is an unfortunate result. In this case the creditors who have suffered by the unsuccessful litigation have not come forward. Otherwise, if they had come forward and said they were willing to give him his certificate on certain conditions, I should have been disposed to do so; but I am bound to refuse it, because the insolvent has not proved to my satisfaction one matter, which he is required to establish under the statute, to entitle him to such a certificate. I am not inclined to grant a conditional certificate, because I have no means of knowing what the proper condition ought to be, or whether I should be justified in granting such a certificate. While I refuse he is not precluded from applying again to the Court under the further subsection of the Act. I should not preclude him from that; I should be willing to hear an application under section 169. That is a right which he has notwithstanding the refusal on this occasion.

I am constrained, therefore, by the cases which I have cited, and by the true construction, as I take it, of the Act, and by the only inferences which I can draw from the trustee's report and from the circumstances; I could not wisely or justly exercise my discretion by giving a certificate to the insolvent. The certificate must be refused.

Solicitor for insolvent: *Drake*.

SEPTEMBER SITTINGS OF THE FULL COURT.

In the matter of DAVID SALMOND, A SOLICITOR.

Misconduct of a Solicitor—Breach of duty.

The solicitor, having recovered a verdict for his client, and the amount of the judgment, with costs, having been paid into Court, the solicitor drew the money out, and failed to pay the same to his client.

Held, that the duty of solicitors is to keep trust accounts, separate from their own, and to pay over money to their clients at once, retaining their proper charges.

MR. SALMOND had recovered a verdict for a client, one Shalvey, and the amount of the judgment, with costs, had been paid into Court. Salmond drew it out, but failed to pay it over to Shalvey, who on several occasions demanded payment. Eventually Salmond gave Shalvey a promissory note and a cheque for the amount, both of which were dishonoured. Shalvey then proceeded against Salmond, obtained judgment for the amount of the promissory note and cheque, and issued execution, which was returned *nulla bona*. The matter was then brought before the Law Association, with a view to enquiry into Mr. Salmond's conduct as an officer of the Court.

Lilley, at the May Sittings of the Court, for the Law Association, obtained a rule *nisi*, calling upon the solicitor to answer the matters charged, and to show cause why he should not be struck off the roll.

Lilley, at this sitting, moved the rule absolute.

Power appeared on behalf of Mr. Salmond, and stated that he had been exceedingly ill for some time past, and had made restitution upon recovery.

LILLEY, C.J.: This is an irregular transaction, and one which places an officer of the Court in a hazardous position. The duty of solicitors is to keep trust accounts, separate from their own, and to pay over money to their clients at once, retaining their proper charges. They cannot be in danger if they do that. Mr. Salmond's client accepted a settlement with him by promissory note; and Mr. Salmond has made restitution, though I do not know that that can weigh with us. Considering his illness, however, and that he has made restitution, we are not inclined to force the

last penalty against a solicitor in this case. He must pay a fine of £25 and costs; if the same be not paid within one month, he is to be suspended from practice until payment.

Solicitor for Law Association: *Osborne.*

Solicitors for respondent: *Daly & Hellicar.*

HARDING, J. 20th September, 1888.

DALY AND HELLICAR *v.* COOPER.

Practice—Order XLV—Charging order—Sale of shares under a fi. fa.

The plaintiffs' claim was for an account of what was due to them for principal, interest, and costs under a charging order on certain shares, and that the said charging order might be enforced by foreclosure and sale.

Held, that it was possible in this colony to sell shares under a *fi. fa.* without a charging order, but that in this case there was an actual charge, and calls had been paid by the plaintiffs, and an account would have to be taken, which could not be done under a *fi. fa.*; and therefore the action was justified.

THE plaintiffs, in their statement of claim, asked for an account of what was due to them for principal, interest, and costs under a charging order on 474 shares in the Broken Hill Block Silver Mining Company, Limited, made by the Court on the 5th January, 1887, and that the said charging order might be enforced by foreclosure and sale.

Feez, for plaintiffs, moved for judgment for relief claimed in the statement of claim, and for costs of action. The plaintiffs' claim was for an account, and for an order for sale of shares.

Feez cited *Leggott v. Western*, 12 Q.B.D., 287, and a similar application in *Miller v. Cooper.*

Harding, J., referred to *The Common Law Pleading Act of 1867*, 31 Vic., No. 4, sec. 57, and 31 Vic., No. 17, sec. 49, *Salt v. Cooper*, 16 Ch. D., 548, *In re Hutchinson*, 16 Q.B.D., 516, and reserved judgment.

HARDING, J.: I am not going to deliver any formal judgment, more than to state that the question of the plaintiffs' powers, had they issued a *fi. fa.*, may be a serious matter in another case; but it appears in this colony to be possible to sell shares under a *fi. fa.* without a charging order being obtained, which is a different power from that existing in England, where the sale cannot be made until a charging order has been obtained. In this case I find there is an actual charge, that calls have been paid by the plaintiffs, and consequently an account would have to be taken, which could not be done under a *fi. fa.*, and, therefore, the action is justified. If no payment had been made by the incumbrancers by virtue of the charging order, the action might not have been necessary. Although, when there is a choice between an action and a *fi. fa.*, the Court would not encourage the expense of an action. In this case there is an admission on the pleadings that calls have been paid, and the order must go. Judgment will therefore be:—Let an account be taken of what is due to the plaintiffs for principal, interest, and costs; and upon payment by the defendant of what shall be certified to be due within two weeks from the Registrar's certificate, let the charging order and all the plaintiffs' rights thereunder be discharged. But, in default, let the shares, or a sufficient part thereof, be sold with the approbation of the judge; and let the money to arise by such sale be paid into Court to the credit of this action, and be applied in payment of what shall be certified to be due to the plaintiffs for principal, interest, and costs as aforesaid, together with the subsequent interest and subsequent costs of this action, so far as it will extend; but, if the same shall not be sufficient to pay such amount, and such subsequent interest and costs in full, this judgment is to be without prejudice to plaintiffs right to enforce payment of the balance in this action.

Liberty to apply at Chambers.

Solicitor for plaintiffs: *Osborne.*

IN INSOLVENCY.

LILLEY, C.J. { 20th July, 1888. 3rd September, 1888.

In the matter of JOHN WALLIS RUTTER, OF ROCKHAMPTON, AN INSOLVENT.

Interest in land—Notice—Priority of title—Mortgagee.

B, by a nomination of trustees under *The Real Property Act of 1861*, conveyed certain lands to trustees in trust, first to pay the rents, income, and profits to, or permit B to receive them during the joint lives of himself and wife, and after B's death, in case he predeceased his wife, then upon trust to pay the rents, incomes, and profits to his wife, or permit her to receive them during her life, and after her death, whether the same happened during B's life or after his decease, upon trust to sell the lands and to hold the proceeds in trust for B or his representatives. Subsequently, in 1885, B sold his interest to R and C. In November, 1886, R, purporting to act under a power of attorney and a letter from B, dated 1885, which was in fact a forgery, mortgaged the whole of the interest in B's name as mortgagor, to one H, as mortgagee. H gave notice of his mortgage to the trustees, but C did not give them any notice. C claimed priority of estate in the half share purchased from B. H rested his claim on his notice to the trustees.

Held, that during the lives of B and his wife, B took in equity a frechold estate in land, and therefore no notice to the trustees of the sale was necessary, and that C was first in time, and prior in right to H.

THIS was an application by the trustee in the insolvent estate for the directions of the Court under the follwing circumstances:—

Prior to the month of December, 1885, Charles Wentworth Bucknell possessed a beneficial interest in certain lands in Rockhampton under a certain instrument of nomination of trustees, under *The Real Property Act of 1861*, dated the 4th day of June, 1878. In December, 1885, the insolvent bought on behalf of himself and Edwin Robert Carpenter, in equal shares, the interest of Bucknell under the said instrument, and an assignment of such interest was executed by Bucknell in favor of the insolvent solely. On the 15th of December, Bucknell executed a power of attorney in favor of the insolvent. By an indenture dated the 4th of January, 1886, endorsed upon the assignment of the 15th of December, 1885, before mentioned, which indenture was prepared by the insolvent as conveyancer for Carpenter, the insolvent, in consideration of £750 paid to him by Carpenter, assigned to Carpenter one moiety of the interest so purchased by the insolvent from Bucknell as aforesaid. No notice of the assignments of the 15th of December, 1885, and the 4th of January, 1886, was ever given to the trustees of Bucknell's property. In the month of November, 1886, the insolvent, purporting to act as agent for Bucknell, applied to George Heath for a loan of £1,000 upon the security of the interest of Bucknell under the said nomination of trustees, and Heath, not knowing that Bucknell had sold his interest, agreed to lend the money, and employed the insolvent to prepare the necessary mortgage. The insolvent accordingly prepared a mortgage, and executed it as attorney for Bucknell, and thereupon Heath paid to the insolvent, as agent for Bucknell, the sum of £1,000. The said mortgage contained a recital that the insolvent had received a letter from Bucknell authorising him to borrow the £1,000 on the security of Bucknell's interest, and there was no doubt that the letter was a forgery. Notice of the mortgage to Heath was given to Bucknell's trustees in the month of December, 1886.

Real, *Byrnes* with him, for plaintiff: When Rutter purchased for himself and Carpenter he became a trustee for Carpenter. *Bradley v. Riches*, 9 Ch.D., 189; *Maningford v. Toleman*, 1 Collier's Ch. Cases. 670; *Wilmot v. Pike*, 5 Hare, 14; *Jones v. Jones*, 8 Simon, 633; *Wiltshire v. Rabbits*, 14 Simon, 76. Prior notice is of no consequence, as it was not a chose in action. Heath had constructive notice through Rutter. Rutter being trustee for Carpenter, nothing that he could do could deprive Carpenter of his right. Carpenter was prior in time to Heath; Heath's prior notice does not give him priority.

Sir S. W. Griffith, *Q.C.*, *Shand* with him, for defendant Heath: Heath had no notice through Rutter, as the doctrine of notice does not apply where the solicitor himself is guilty of fraud. *Cave v. Cave*, 15 Ch.D., 639; *Kennedy v. Green*.

3 Milne & Kean, 699. This matter is in the nature of a chose in action, and therefore the rule as to notice must apply, and Heath has the best title by first notice. The cases of *Jones v. Jones*, *Wilmot v. Pike*, and *Wiltshire v. Rabbit* (*vide supra*), are cited in *Ryall v. Rowles*, 2 White & Tudor, 790 (5th ed.), 869 (6th ed); *Re Hughes' Trusts*, 2 Henning and Millan, 89; *Foster and others v. Cockerell*, 3 C. & F., 456; *Lee v. Howlett*, 2 Kay & J., 531. Rutter had power to mortgage under his powers of attorney. *In re Cooper*, *Cooper v. Vesey*. 20 Ch.D., 611; *Taylor v. Needham*, 2 Taunton, 278. The mortgage from Rutter binds his interest, which then takes effect from the time of the notice. *Dearle v. Hall*, 3 Russell, 1; *Boursot v. Savage*, L.R., 2 Eq. Ca., 142.

Feez, for defendant Harden, the trustee, submitting to the order of the Court.

C. A. V.

On the 3rd September, His Honor THE CHIEF JUSTICE delivered the following judgment:—

THIS matter resolved itself into a question whether in respect of a certain interest in property the plaintiff Carpenter or the defendant Heath was entitled to priority of title. The insolvent Rutter, on behalf of himself and Carpenter, in 1885 purchased the interest from one Bucknell, taking an assignment of the title to himself; but afterwards Rutter, in January, 1886, assigned to Carpenter the half share to which the latter was entitled. In November, 1886, Rutter, acting under a power of attorney from Bucknell, dated 1885, and fraudulently pretending to have received instructions from Bucknell in a letter which was in fact a forgery, mortgaged the whole of the interest in Bucknell's name as mortgagor to the defendant Heath as mortgagee. As we have seen, Bucknell had really sold the interest to Rutter and Carpenter, and had no part in it to mortgage to anyone. Bucknell took his interest under a nomination of trustees under *The Real Property Act*. Heath gave notice of his mortgage to the trustees, but Carpenter did not give any notice to them. Carpenter claims priority of estate, as the sale to him was first in point of time. Heath rests his claim on his notice to the trustees, which, although later in time, places him first, he contends, in right. The solution of the question of right depends upon the nature of the interest which Bucknell sold, and which Rutter afterwards mortgaged. If it was an interest in land, then Carpenter's right would prevail, as no notice would be needed from him to the trustees; but if it was an interest in a money fund, then Heath's right would be prior to Carpenter's, as notice would be needed and had been given by Heath, and not by Carpenter, to the trustees.

The estate or interest was created by the nomination of trustees, by which instrument Mr. Bucknell, the registered proprietor, transferred certain lands to trustees, first to pay the rents, income, and profits to, or permit Bucknell to receive them during the joint lives of himself and wife, and after the death of Bucknell, in case he predeceased his wife, then upon trust to pay the rents, &c., to, or permit her to receive them during her life, and after her death, whether the same happened during Bucknell's life or after his decease, upon trust to sell the lands and to hold the proceeds in trust for Bucknell or his representatives. Bucknell and his wife are still living. Under these trusts Bucknell took in equity a freehold interest in land; that is, an estate in the rents during the joint lives of his wife and himself. In that estate for the time being his other and lesser interest under the trust is merged;—the fund does not exist, nor has the event happened on which its possible existence depends. It was not necessary, therefore, for Carpenter to give notice to the trustees; he is first in time and prior in right to Heath, and there must be judgment for him that he is entitled to his share and his costs against Heath, who must pay the costs of the trustee Harden.

Solicitor for Carpenter: *Thompson*, Rockhampton, by his agent *Bernays*.

Solicitors for Heath: *Hart & Flower*.

Solicitors for trustee: *Wilson, Wilson & Brown*.

IN CHAMBERS.

HARDING, J. 4th October, 1888.

MARKWELL *v.* BROWN.

Order XIV, r. 1a—Leave to sign final judgment granted—Judgment reversed on nonconformity with order—Affidavit in support of summons must be sworn before service.

AN application for leave to sign final judgment as per summons was granted. The defendant's solicitor issued a summons to set aside the judgment on the ground *(inter alia)* that the requisites of Order XIV, r. 1a, had not been complied with. It appeared that a judgment summons had been issued on the 22nd September; this summons was served on the same date, accompanied by a so-called affidavit in blank. This affidavit was not sworn till 25th September, and consequently not being sworn it could not be an affidavit at the time of service on the defendant. On this ground the judgment was reversed.

Solicitor for plaintiff: *Winter.*

Solicitor for defendant: *Keane.*

HARDING, J. 4th October, 1888.

Re THE GOODS OF GOTTFRIED SEEGART, DECEASED.

Application for Administration—Intestacy Act of 1877 (41 Vict., No. 24)—Crown Lands Alienation Act of 1868 (31 Vict., No. 46)—The Grants and Leases to Deceased Persons Act of 1884 (48 Vict., No. 9), Sec. 1—Personalty.

The intestate died in 1876, being owner of a selection under *The Crown Lands Alienation Act of 1868.* His widow obtained a grant of Letters of Administration of his personal estate in 1884; and in 1885 a Crown grant for the selection was issued in the name of the deceased under *The Grants and Leases to Deceased Persons Act of 1884.* The Master of Titles refused transmission of the land under the Letters of Administration of personal estate. Grant of Letters of Administration of real estate was also refused by the Registrar on the ground that the intestate died prior to the passing of *The Intestacy Act of 1878.* Notice having been served on the heir-at-law.

Held, that a selection under *The Crown Lands Alienation Act of 1868* was personalty, and remained so, even after deed of grant. Administration was granted to the widow.

Bright v. The Attorney General followed.

O'Sullivan for Ernestine Seegart, the widow, applied for a grant of administration of real estate. It appeared from the evidence that Gottfried Seegart died on the 7th April, 1876, intestate, being the owner of a selection under *The Crown Lands Alienation Act of 1868*, taken up on the 23rd March, 1874.

His widow applied for, and obtained a grant of Letters of Administration of his personal estate on the 1st May, 1884. A crown grant for the selection was issued on the 13th March, 1885, in the name of the deceased, under *The Grants and Leases to Deceased Persons Act of 1884* (48 Vic., No. 9).

Application for the transmission of the land under the Letters of Administration of personal estate having been refused by the Master of Titles, the widow of the deceased made application to the Registrar for a grant of Letters of Administration of the real estate, which he refused, requiring authority to be shown for the grant of administration of real estate of a person who died prior to the passing of *The Intestacy Act of 1877.* The application was renewed on September 20th before His Honor Mr. Justice Harding, who directed the matter to be adjourned for notice to be served on the heir-at-law.

On the renewal of the application an affidavit of Ernestine Seegart, the widow, was read, in which the deponent swore to having personally served the heir. His Honor commented on the unsatisfactory nature of the affidavit, and spoke of the undesirability of solicitors allowing parties to have anything to do with documents in which they were interested. There was also a formal defect in the affidavit, inasmuch as the name of the town agent was not endorsed. His Honor allowed this to be amended.

Harding, J., referred to *Bright v. Attorney-General*, decided in December, 1873, which laid down that a selection under *The Crown Lands*

Alienation Act of 1868 was personalty, and that it remained so even after the deed of grant; and ordered administration to be granted to the widow.

Solicitor for applicant: *Stafford*, Maryborough; by his agents, *Lilley & O'Sullivan.*

NOVEMBER SITTINGS OF THE FULL COURT.

MULVENA *v.* THE COMMISSIONER FOR RAILWAYS.

Contract—Certificate of Engineer—Demurrer to Damages—Arbitration—Refusal to refer.

In an action on a contract for the construction of a railway, wherein the plaintiff undertook to complete the same to the entire satisfaction of the "Chief Engineer," and which also contained a prospective agreement that if any difference arose, it should be referred, it was alleged by the plaintiff, in his statement of claim, that he was wrongfully discharged from completing the work, that he made various claims and requested the engineer to proceed with the reference, which he refused to do, that the engineer resigned, and no other person was appointed as engineer under the contract, and that the disputes and differences had never been decided.

Held, on demurrer, that the plaintiff's action was really an action against the Commissioner, for a refusal to refer his claims to arbitration, and that such an action might be maintained, and that the absence of the engineer's final certificate was, under the circumstances, no bar to the plaintiff's right to recover.

Held, also, that the other demurrers were in the nature of demurrers to damages, and that a demurrer of that kind is never allowed.

THIS was a demurrer to the plaintiff's statement of claim in an action upon a railway contract, wherein the plaintiff claimed damages for loss sustained by him, by reason of the action of the Chief Engineer, and of the Government, in the carrying out of the contract.

The argument was heard at the September Sittings of the Full Court.

The plaintiff's statement of claim, so far as it is material to be set out, was as follows:—

2. By an indenture made the thirteenth day of March 1882 between the plaintiff (therein and in the documents annexed thereto called "the Contractor") of the one part and the defendant (thereinafter and in the documents annexed thereto called "the Commissioner") for and on behalf of the Government of Queensland of the other part after reciting amongst other things not material to be herein mentioned that in pursuance of a certain notice a copy of which was thereto annexed tenders were invited for the construction of second section of the Clermont Railway described as Contract number 2 commencing at a point marked 197 miles 20 chains on the general plan and section and terminating at a point marked 227 miles 40 chains on the said general plan and section being in length 30 miles 20 chains according to the plans sections drawings specifications and general conditions copies of which respectively signed by the Contractor were thereto annexed And that in consequence of such notice the Contractor made the tender thereunto annexed for the performance of the said works agreeably to the said plans sections drawings specifications and general conditions for the prices or sums set out in the detailed schedule of prices to the said tender and thereunto annexed according to the quantity to be actually executed and to complete the same on or before the thirtieth day of June 1883 and also to maintain the same for a period of six calendar months from the date when the whole of the works should have been executed and completed in accordance with the said plans and specifications and general conditions And it was a condition of the said tender that the person tendering should deposit to the credit of the Commissioner for Railways the sum of £1000 as a guarantee of his intention to carry out the works which the Contractor had accordingly done and that the said tender had been duly accepted by the Commissioner for Railways And that it was a condition of the said tender that the Contractor whose tender should be accepted should in addition to the said deposit of £1000 deposit with the Commissioner for Railways within 14 days of the acceptance of his said tender such further sum as should altogether amount to five per centum on the total estimated amount of the contract to be retained by the Commissioner as security until such time as he should be satisfied that the Contractor had plant and materials on the works the value of which together with the retention money referred to in the general conditions held by the Commissioner should amount to an equal sum to that deposited and that it had been agreed between the parties thereto that all and singular the documents specified in the schedule thereto and either annexed thereto or referred to therein should be embodied in and form part and parcel thereof It was witnessed that in consideration of the payments to be made to the plaintiff under and by virtue of the said indenture the plaintiff covenanted with the defendant that the plaintiff would well and faithfully execute perform complete finish and maintain all and singular the works of whatsoever description specified and comprised or referred to in the several documents mentioned in the schedule thereto annexed or some or one of such documents at the prices respectively and within the times respectively mentioned and strictly according to the terms and conditions therein respectively contained or reasonably to be deduced therefrom And it was also witnessed that in consideration of the covenant on the part of the plaintiff thereinbefore contained the defendant thereby for himself and his successors on behalf of the Government of Queensland covenanted with the plaintiff

that he should upon receiving the certificate of the Chief Engineer to the effect that the plaintiff had plant and materials on the works the value of which together with the retention money then held by the Commissioner should amount to an equal sum to that deposited in accordance to clause two of the special conditions and instructions to tenderers for works repay the contractor the amount of such deposit And it was further witnessed that the defendant or his successors on behalf of the Government of Queensland should and would repay to the plaintiff all sum and sums of money to which the plaintiff should become entitled by virtue of the said indenture including the documents mentioned in the schedule thereto as and when the same should become due or payable according to the specifications and general conditions and other documents thereto annexed as aforesaid but it was thereby expressly agreed that the true intent and meaning of the said indenture and of the parties thereto was that the obtaining by the Contractor of the Engineer's Certificate entitling him to payment of any amount claimed whether by way of damages or otherwise should be a condition precedent to payment thereof being made or enforced.

3. The tenders "A" and "B" of the plaintiff annexed to the said indenture were for the amount of £32,162 10s. 0d. for the construction of the said second section of the said Clermont Railway.

Certain general conditions annexed to the said indenture were set out in paragraph 4 and appear sufficiently from the judgment.

5. After the making of the said indenture the plaintiff entered upon the performance of the works therein respectively described and previous to the nineteenth day of September 1883 did and performed work under the said indenture of the value of £21,499 11s. 7d. strictly in accordance with the terms and conditions thereof and was paid by the said defendant in accordance with the terms of the said indenture sums of money amounting to £18,032 19s. 0d.

6. There is still due from the said defendant to the plaintiff the sum of £3,466 12s. 7d. in respect of the said work done and performed by the plaintiff as aforesaid.

7. The Chief Engineer appointed under the said contract and in charge of the said works during the progress thereof was one Robert Ballard and the Superintending Officer in charge was one John Gwynneth junior.

8. During the progress of the said works certain alterations and extra works were ordered in writing by the said Robert Ballard and John Gwynneth junior and duly executed by the plaintiff.

9. During the progress of the said works the said Robert Ballard as such Chief Engineer as aforesaid and the said John Gwynneth junior as such Superintending Officer gave divers directions to the plaintiff with respect to the performance and mode of carrying out of the said works and condemned on divers occasions workmanship and material employed or used by the plaintiff upon the said works.

10. The plaintiff considered and still considers and alleges that such directions were unreasonable and oppressive and that the said Robert Ballard and John Gwynneth junior unreasonably and unjustly condemned and rejected the said workmanship and material.

11. Disputes and differences arose between the plaintiff and the said Robert Ballard during the progress of the said works with respect to the work already performed under the said contract and with respect to the payment for alterations and extras relating to the said works and in particular with respect to the matters in the next following paragraph hereof stated which said disputes and differences owing to the facts and circumstances in paragraphs 19 20 21 22 and 23 hereinafter mentioned have never been settled or adjusted.

12. By reason of the aforesaid action and conduct of the said Robert Ballard and John Gwynneth junior the plaintiff has been put to great loss and expense.

Here followed particulars of damage sustained.

13. The locomotive engine supplied by the defendant to the plaintiff under the said contract was wholly insufficient and unsuitable for work by reason whereof the plaintiff sustained very great loss in the performance of the work executed by him under the said contract and in maintaining that part of the said railway completed by him under the said contract The plaintiff made frequent complaints of such inefficiency and unsuitableness to the said Robert Ballard as such Engineer as aforesaid and the said John Gwynneth junior as such Superintending Officer as aforesaid but they refused to entertain or recognise the said complaints.

14. The defendant did not supply the plaintiff with twenty ballast waggons to be used in ballasting and laying the permanent way but only supplied the plaintiff with seven ballast waggons which were not in a proper condition and safe to be used in ballasting and laying the permanent way by reason whereof the plaintiff sustained very great loss in the performance of the work executed by him under the said contract. The plaintiff frequently requested the defendant to supply him with the remaining number of ballast waggons in a fit and proper condition to be used in ballasting and laying the permanent way but he refused and neglected so to do.

15. By reason of the facts and circumstances set out in paragraphs 8 9 12 13 and 14 hereof the plaintiff was delayed in the commencement of the said works and the progress thereof was stopped and retarded as in the said paragraphs stated by the delay and default of the defendant and on the 11th day of July 1883 the said Robert Ballard as such Chief Engineer as aforesaid granted an extension of time for completing the said works for a period of four months from the 30th day of June 1883.

16. Subsequently to the said 11th day of July the plaintiff made great progress with the said works and all conditions were performed and fulfilled and all things happened necessary to entitle the plaintiff to carry out and complete the same under the said contract.

17. Before the expiration of the said extended period of four months to wit on the 19th day of September 1883

and while the plaintiff was in fact making great and sufficient progress with the said works and before the plaintiff had completed the said works the defendant acting on the opinion and representations of the said Robert Ballard that the progress made by the plaintiff with the said works was insufficient and claiming to act under the powers conferred upon him by the said condition number 22 wrongfully prevented and discharged the plaintiff from completing the same whereby the plaintiff was deprived of the profits which he would have made if he had not been so prevented from carrying out and completing the said contract and discharged from completing the same.

18. The defendant took possession of and retained plant and furniture of the plaintiff of great value.

19. The plaintiff preferred claims to the defendant in respect of all the matters in paragraphs Nos. 5 6 8 12 13 14 17 and 18 hereof set forth and he submits and contends that he was entitled to have them determined and decided by the said Robert Ballard as such Engineer in Chief appointed under the said contract.

20. On or about the 20th day of August 1884 the plaintiff requested the defendant to refer the said disputes and differences hereinbefore mentioned to the said Robert Ballard as such Engineer as aforesaid for his decision.

21. The plaintiff also requested the said Robert Ballard to proceed with the said reference but he refused to do so.

22. Prior to the date in the next paragraph mentioned the plaintiff frequently requested the defendant to proceed with the said reference and to require the said Robert Ballard as such Engineer in Chief to proceed with the same and requested the Government of the said Colony to direct the said Robert Ballard to proceed with the same but the defendant and the said Government at all times refused and neglected so to do and the said disputes and differences have never been decided by the said Robert Ballard as Engineer in Chief as aforesaid.

23. On the 6th day of May A.D. 1886 the said Robert Ballard resigned his said position as Chief Engineer and no person has since been appointed as Chief Engineer under the said contract.

24. The plaintiff submits that under the circumstances herein stated he is entitled to have his rights in respect of the premises ascertained and enforced in this Honorable Court.

The defendant demurred to the whole statement of claim on the ground that the plaintiff was not entitled to recover without having first obtained the certificate of the Chief Engineer. The defendant also demurred to specific paragraphs of the statement of claim on grounds sufficiently set out in the judgment.

Griffith, *Q.C.*, with him *Power*, *Lilley*, and *Byrnes*, appeared for the plaintiff; *Chubb*, *Q.C.*, and *Real* for the defendant.

The arguments sufficiently appear from the judgment.

C. A. V.

The following judgment was delivered on Nov. 6th by His Honor THE CHIEF JUSTICE:—

The questions for decision have been raised by demurrers to the whole cause of action, and to several portions of the plaintiff's statement of claim. To the whole statement of claim, except paragraph 18, the defendant, in paragraph 39 of his defence and counter-claim, says, by way of demurrer, that the facts stated do not entitle the plaintiff to recover without having first obtained the Chief Engineer's certificate. The plaintiff sues upon a contract for the construction by him of the second section of the Clermont Railway, by which he undertook to complete the same on or before the 30th June, 1883, to the entire satisfaction of the "Chief Engineer," which is defined to mean "the Chief Engineer appointed to act under this contract;" and the works were to be "carried on under the immediate charge of a "District Engineer, or other superintending officer, "whose directions in all points relative to the mode "of executing the works, or to the nature and "quality of the materials used, or the workmanship, "are to be received and acted upon by the contractor, and such officer shall have power to reject "and condemn any workmanship or material that "he may deem unsuitable for the purpose intended, "or at variance with the terms of the specifications, "and any materials or workmanship so condemned "and rejected shall be promptly removed and "replaced by the contractor, at his own cost, with "other material or workmanship, to the entire satisfaction of the superintending officer; but, in case "the contractor should consider that the District "Engineer or superintending officer unnecessarily "or unjustly condemns and rejects any materials "or workmanship, or should any dispute relating "to the works arise between the contractor and "District Engineer or superintending officer, such "dispute shall be by them referred to the Chief "Engineer, whose decision shall be final and "binding on both parties; but the contractor, his

"agent, or workman shall on no account whatever "proceed with any work so condemned, or use any "materials so rejected, until the same shall be "either removed or replaced, or, the Chief Engi- "neer's decision having been obtained, the work "shall be authorised by him to be proceeded with."

By condition 18 of the contract it is provided that "the contractor will be paid once in every "month up to the date specified for the completion "of the contract, upon the certificate of the Chief "Engineer, as the works proceed, in the proportion "of ninety per cent. of the value of the work satis- "factorily performed, and the remaining ten per "cent. shall be retained by the Commissioner as "security for the due performance of the contract, "until the Chief Engineer has certified that the "whole of the works have been completed to his "entire satisfaction, when it shall be paid to the "contractor, under deduction of such sum as the "Engineer shall fix as a reasonable sum to be "retained as security for the maintenance of the "line and works during the period hereinafter "specified, on the expiration of which, when the "terms of the contract as to maintenance have "been complied with, the balance shall be paid; "and it is expressly declared that the obtaining a "certificate from the Chief Engineer that the work "done by the contractor has been satisfactorily "executed or completed to his satisfaction, and "that he the said contractor has observed and com- "plied with the several conditions on his part "herein contained, shall be a condition precedent "to the contractor having any right or cause of "action in respect of work done or materials pro- "vided, and to the contractor having any right of "action or claim to the payments from time to time "to be made hereunder, as well as to the final pay- "ment upon the whole of the work being finished."

By condition 19 it is further provided, "no cer- "tificate given to the contractor, for the purpose "of any progress payment, shall prevent the Chief "Engineer, at any future time before the termi- "nation of the contract, rejecting all unsound "materials and improper workmanship discovered "subsequently to the giving of the last previous "certificate; and, notwithstanding the giving of "any certificate that portions or the whole of the "works have been satisfactorily performed, the "Chief Engineer may require the contractor to "remove and amend, at any time previously to the "final payment on account of the construction or "maintenance of the works, any work that may be "found not to have been performed in accordance "with the contract; and the contractor must "remove and amend all such work or material at "his own cost. And the Commissioner shall have "full power, on the report of the Chief Engineer "that the work as approved of as aforesaid is not "in accordance with the contract, to deduct from "any moneys that may become due to the con- "tractor the whole amount that has been paid on "account of such work. And if, in the opinion of "the Engineer, further inquiry is necessary or "desirable before any certificate is given, he shall "have power to withhold such certificate for the "purpose of making such inquiry."

These conditions provide for the progress of the works; for the settlement of interim disputes, should they arise; for progress payments, that is payments on account; and for the final certificate, entitling the contractor to payment of the balance on completion of the work; and it is important to observe that, by condition 19, even the so-called final certificate is not absolutely final, but that further requisition may be made on the contractor to remove or amend any work that may be found not in accordance with the contract. The contract expressly makes the obtaining of the Engineer's certificate a condition precedent to the right of the contractor to recover the amount finally due to him. However, by a reasonable construction of the conditions, it is not until an unequivocal acceptance by the contractor of the final certificate of the Chief Engineer, or until the final payment upon that certificate, that the claims of the respective parties to the contract can be held to be absolutely closed and determined. All the interim and progressive inquiries, decisions, and certificates are, as between the parties to the contract, in reality tentative. They would doubtless be impor-

tant as evidence on an inquiry under condition 40, which seems to us to give the parties a right to a final hearing and determination by the Chief Engineer, irrespective of any other intermediate decision. The other conditions provide a rough and ready means of settling, for the time, any dispute arising between the contractor and the Engineer or his subordinates, and are designed to prevent delay in the progress of the work; but they are modified, controlled, and finally subordinated to the rights of the parties under condition 40, which is as follows:—"Should any dispute "arise as to the proper interpretation of the "specifications, or as to what shall be considered "carrying on the work in a proper and workman-"like manner, or as to the quality of the work or "materials used, or as to the expense of any "additional work or deduction from that specified, "or as to any alteration which may be more or "less expensive than the work specified, or as to "any payments or claims in respect of the work, "or as to the proper maintenance of the works "or in respect of the alleged breach of these "conditions, or any of them, or as to any other "claim, matter, or thing connected with, or in any "way arising out of this contract, directly or "indirectly, whether professional or otherwise, the "same shall be referred to the Chief Engineer, "whose decision shall be final and binding on all "parties, anything in law or equity to the contrary "notwithstanding. And no action or suit shall be "brought by the contractor against the Com-"missioner, until the matters in dispute between "them shall have been so referred to, and decided "by, the Chief Engineer, and then only for such "sum as he shall award in respect thereof: and "the Commissioner shall not in any case be liable "to pay any sum by way of damages or otherwise "howsoever to the contractor in respect of any "matter in dispute, until the amount thereof shall "have been assessed and awarded by the Chief "Engineer."

Now the plaintiff alleges that he was wrongfully discharged from completing the work; that he made various claims, which he specifies; that he requested the defendant to refer the disputes and differences to the engineer; that he requested the engineer to proceed with the reference, which he refused to do; that the engineer resigned, but that prior thereto the plaintiff requested the defendant, and the Government, to proceed with the reference, and to direct the engineer to proceed with the same, but they refused and neglected to do so; that the disputes and differences have never been decided, and no other person has been appointed as engineer under the contract, and the plaintiff submits he is entitled to have his rights ascertained and enforced in this Court. The plaintiff's claim is really an action against the Commissioner for a refusal to refer his claims to arbitration. That such an action may be maintained is clear from *Ralli v. Livingstone*, 5 E. & B., 132; 24 L.J., Q.B., 267, *Williams v. Commissioner for Railways* (Queensland Supreme Court), and *Annear v. Commissioner for Railways* (Queensland L.J., vol. i, 162). The cause of action is set out with sufficient clearness in the plaintiff's statement of claim, and the absence of the engineer's final certificate is, under the circumstances, no bar to the plaintiff's right to recover. The demurrer to the whole claim, therefore, fails, and the plaintiff is entitled to judgment on this ground of demurrer. With regard, then, to the demurrers to the plaintiff's detailed claims in paragraphs 5 and 6, subparagraphs 10 and 11 of paragraph 12, and paragraph 15, and subparagraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of paragraph 12, and paragraphs 8, 9, 10, 11, and 12, and paragraph 17, indeed to the whole of the several detailed and specified portions of the plaintiff's claims in these other demurrers, we are of opinion that these demurrers are in the nature of demurrers to the damages. Now, a demurrer of that kind is never allowed, as it is a matter for the judge's direction to the jury as to the nature of the damages which the plaintiff can recover, and, in this case, these claims are matters in the nature of loss or damages which the plaintiff alleges he has sustained by the defendant's refusal to refer; which the engineer would have been

required to adjudge either for or against him, and upon which, now, in this tribunal, the judge must direct, and the jury decide. There will be judgment for the plaintiff. The demurrers are all overruled with costs.

Solicitor for plaintiff: *Unmack.*

Solicitor for defendant: *Crown Solicitor.*

NOVEMBER SITTINGS OF THE FULL COURT.

HALL AND OTHERS *v.* GORRIE.

"The Gold Fields Act, 1874" ss. 62-64, 69, rr. 30, 60-72—Miner's Right—Water Rights, s. 9—Gold Mining Lease—Right to Subsoil.

The holders of miners' rights being registered as proprietors of certain areas, called water rights, and being in occupation and having performed all conditions, objected to a lease being granted for mining purposes, comprising part of their water rights, and claimed an injunction.

Held, that assuming the facts stated, the defendant is entitled to mine under the surface occupied by the plaintiffs as water rights.

An order was made in Chambers by Mr. Justice Harding, that the question of law arising in this action, should be raised for the opinion of the Court before the trial of issues of fact.

Sir S. W. Griffith, Q.C., *Power* and *Real* with him: This is an action by the plaintiffs for a declaration of rights and an injunction against the defendant. The plaintiffs are the holders of miners' rights, and are registered as the proprietors of four separate areas called water rights, on the Crocodile Creek Gold Field. They have been in actual possession and occupation of these rights for a considerable time, and have complied with all the necessary conditions. On 23rd January, 1888, the defendant made application for a gold mining lease which comprised the whole of two of these water rights and part of another. The plaintiffs objected, but the lease was issued without their consent. The defendant claims to be entitled to mine under the plaintiffs' reservoir, and plaintiffs claim a declaration that the lease, so far as their areas which are included in it are concerned, is invalid, and that the defendant has no right to occupy or possess these rights, and ask for an injunction to prevent him from mining underneath. The defendant replies that his application has nothing to do with surface rights, but that he has the right to mine underneath. The question before the Court is whether assuming the facts as stated, the defendant is entitled to mine under the plaintiffs' land. The power to issue leases is conferred by s. 10 of *The Gold Fields Act of 1874*, which sets forth that it shall be lawful for the Governor-in-Council to grant leases to any person of any Crown lands not occupied by the holder of a miner's right, unless with the consent of the holder of the miner's right. S. 9, ss. 11-16; reg. 60-63, 72. The defendant consequently is not entitled to mine below the plaintiffs' dam, unless he can shew that the plaintiffs are not in lawful possession.

Power followed.

Chubb, Q.C.: It is clear by the law of England that different persons may have the right to use different depths of ground; as, for instance, one might be entitled to the surface, another to the subsoil, another to the subjacent strata. There is nothing in the Act which gives the plaintiffs a right even to the surface, except as a catchment area, and other persons obtaining a lease might mine on the surface, provided the plaintiffs' rights were preserved. Their right to interfere with the defendant, only arises when the defendant causes them injury.

The site of the dam may be mined upon. *Reg.* 30; *Humphries v. Brydon*, 12 Q.B., 744; and the *Bally Corkish Silver, Lead and Copper Mining Company v. Harrison*, L.R. 5, P.C. 49, were cited.

Lilley: Plaintiffs are only entitled to the catchment area and the water. The Government only granted them a right to the water and a right to use the surface as a dam. Ss. 9, 9 (2), 9 (3), 97, reg. 60, 72, 67 were referred to. By *The Gold Fields Act of 1886*, the provisions of s. 10 are extended to business and residence areas, and persons can mine under them, but there is no mention made of water rights, from which it was to be inferred that, in the minds of the Legislature a water right was not an occupancy. By s. 64, the plaintiff has a right to go to the Warden's Court, for any injury to the dam. *The Parade Gold*

Mining Company v. Royal Harry Quartz Gold Mining Company, 2 Vic. L.R., Cases at Law, 214, 222, were cited.

Sir S. W. Griffith, Q.C., in reply: We contend that we have a prior right, and the Crown cannot do anything to interfere with our statutory rights, provided our title is a good one. Reg. 30 provides for double occupancy. What is the nature of the plaintiffs' occupation under s. 10? If the Governor-in-Council has a legal right to issue the lease claimed by the defendant, the plaintiffs have no case. C. A. V.

MR. JUSTICE HARDING delivered the judgment of the Court, on the 4th December, as follows:

The plaintiffs, holders of miners' rights, allege that they being duly registered in the office of the Warden are entitled to the occupation of four several areas of land, adjoining one another and comprising in all 17 acres, situated on the River Dee, on the Crocodile Creek Gold Field, and known as water rights Nos. 3, 9, 9A, and 24, as sites for the construction of dams and reservoirs, and having been in possession and occupation of each and every of the said areas, and having used and continued to use the same in accordance with *The Gold Fields Act of 1875* and regulations, from the time of their said registration as the proprietors thereof up to the present time, and having complied with and performed all conditions required by the said Act and regulations necessary to entitle them thereto, have constructed dams and reservoirs thereon and have stored water thereon, for mining and general purposes, and that about the 23rd day of January, 1888, the defendant, George Gorrie, applied for a lease of 24 acres, 3 roods, and 35 perches of auriferous lands on the said Crocodile Creek Gold Field, and that his application for lease No. 136, and that such land comprised the whole of the plaintiffs' areas, Nos. 3 and 24, and part of Nos. 9 and 9A, and that the plaintiffs objected to the said application so far as it affected their said areas or water rights; and that, on the 8th day of June, 1888, a lease was issued without their consent to the said defendant, George Gorrie, by the Governor, under the seal of the Colony of Queensland, of the land so applied for, and that such lease is known as gold mining lease No. 136, and that the defendant, George Gorrie, claimed to be entitled to occupation and possession of so much of the plaintiffs' said areas as is comprised in the said lease, and to carry on gold mining operations on and under the plaintiffs' said areas, under and by virtue of the said lease, and the plaintiffs' claim.

(1) A declaration that the said lease, so far as regards so much of the plaintiffs' said areas or water rights as is included in the said lease, is invalid and void.

(2) A declaration that the defendant has no right or title to occupy or possess the plaintiffs' water rights.

(3) An injunction restraining the defendant from carrying on mining operations, in or upon or under the surface of the land comprised in the plaintiffs' said areas or water rights, or any part thereof, or removing therefrom any gold, earth, stone, or other auriferous materials.

The defendant, George Gorrie, contends that the plaintiffs' registration does not entitle them to occupy the said areas of ground, but only confers on them a right to occupy the surface of the areas for the purposes of such water rights, and admitting that on the 8th day of June, 1888, a lease, known as gold mining lease No. 136, was issued to him without the consent of the plaintiffs, or either of them, says that such lease was issued to him exclusive of surface of water rights Nos. 3 and 24, and of surface rights of water rights Nos. 9 and 9A, and of all other surface rights.

The same defendant claims under the said lease to be entitled to carry on mining operations under the surface of the areas known as water rights Nos. 3 and 24, and of the parts of the water rights known as Nos 9 and 9A included in the said lease, but he does not claim to be entitled to carry on mining operations on the surface of the said areas or of any part of them. Upon the above facts, the following question of law has been submitted for the opinion of this Court:—

Under an order of the 8th day of September, 1888, that the question of law arising in this action should be raised, for the opinion of the Court before the trial of the issues of fact.

Whether assuming the facts and circumstances alleged in the statement of claim to be proved, the defendant's lease, as set out in the statement of defence, is valid as against the plaintiffs, so as to entitle the defendant to mine under the surface of the land occupied by the plaintiffs as water rights.

The above statement of facts raises a question of construction, under the 9th section of *The Gold Fields Act of 1875*.

The 2nd section of that Act, the interpretation clause, defines a "claim" in the following words:—"That portion of Crown land which any person or number of persons shall lawfully have taken possession of and be enabled to occupy for mining purposes, or any number of such portions lawfully amalgamated by the holders, provided that no land comprised in any lease granted for mining purposes shall be deemed to be a claim;" and "mining purposes"—"the purpose of searching for and obtaining gold from earth by any mode or method of mining, and of stacking or otherwise storing any auriferous earth," consequently the main essentials of a claim are possession and occupation of Crown land, with the right to search for and obtain gold from its earth by mining—in other words, digging under ground.

The privileges conferred on the holder of a miner's right are contained in the 9th section, which enacts that:—

Any person who shall be the holder of a miner's right, and any number of persons in conjunction who shall be the holders of any such consolidated miner's right, shall, subject to the provisions of this Act and to the regulations, be entitled (except as against her Majesty):—

(1) To take possession of, mine, and occupy Crown lands for mining purposes.

(2) To cut, construct, and use races, dams and reservoirs, roads and tramways which may be required for gold mining purposes, through and upon any Crown lands.

(3) To take or divert water from any spring, lake, pool, or stream, situate in or flowing through Crown lands on a proclaimed gold field, and to use such water for mining purposes and for his own domestic purposes, and to use by way of an easement any unoccupied Crown lands.

(4) To take possession of and occupy Crown lands for the purpose of residence on a proclaimed gold field, but not for business purposes except as hereinafter otherwise provided.

(5) To put up and at any time to remove any building or other erection upon such land so taken up and occupied.

(6) To cut timber on and to remove the same, to strip and remove the bark from any such timber, and to remove any stone, clay, or gravel from any Crown lands for the purpose of building for himself or themselves any place of residence, or for mining purposes.

And any person or persons so taking up and occupying Crown land as aforesaid, shall, subject as aforesaid, be deemed in law to be possessed (except as against her Majesty) of such lands so taken up and occupied, and the property therein, and every share or interest which may be created therein under this Act or the regulations, shall be deemed a chattel interest. And all gold then being in and upon such land taken up and occupied for mining purposes, shall (except as against her Majesty) be the absolute property of the person or persons in lawful occupation of the same, and the holder or holders of any such land taken up and occupied as aforesaid, for mining purposes, or for the purpose of residence, may assign and encumber the same or any undivided share or interest therein, provided that no person or persons shall obtain any interest under any such assignment or encumbrance, except he or they be the holder of a miner's right.

The section contains six sub-clauses showing the various interests acquirable by the holder of a miner's right. The first sub-clause—"To take possession of mine and occupy Crown lands for mining purposes"—contains all the ingredients of a claim as above deduced from the interpretation clause. Each of the remaining five sub-clauses contains something less. Neither of them contains all the requisites of a claim, as defined by the interpretation clause. The second sub-clause extends only to rights through and upon the land; the user of the land given by sub-section 3 is only by way of easement for the purposes allowed; sub-section 4 gives rights of possession and occupation of Crown lands for residence; sub-sections 5 and 6 give rights as to removing buildings and

cutting timber and removal of other things, not necessary to be further referred to, and which do not affect the present question. The latter part of this section gives, in law, to the person so taking up and occupying Crown land as aforesaid, the possession of the land "so taken up and occupied and the property therein," that is, in so much as is "taken up and occupied" by virtue of the sub-clause which is under sub-section 1. The clause sub-section 2, the part passing "through" or upon which the right vests; 3, the easement and so on; the fourth enacting part of the section gives the gold in "such land taken up and occupied for mining purposes" to the person in lawful occupation.

Under this last enactment, it is obvious that the gold only belongs to the person who has taken and occupies the land for mining purposes, that is, digging under ground for the purpose of obtaining gold.

The right given by sub-section 2 is "to construct and use" "dams and reservoirs" required for "gold mining purposes," without any words conferring a power to deal with the land thereunder for gold mining purposes—digging under ground for the purpose of obtaining gold; consequently the second sub-section gives no right to the gold under the "dam or reservoir;" similar reasoning gives the same result as to the right conferred by sub-section 3.

The section, therefore, does not give to the holder of the rights conferred by sub-sections 2 and 3 the gold thereunder, the right to mine therein, or the property in anything more than the part passing through or upon which the right vests. In short, sub-sections 2 and 3 give to the holder of the rights conferred thereby, in respect of the Crown land subject thereto, a right to sufficient support and surface or tunnel existence to enable the rights to continue.

This construction of the 9th section receives strong confirmation from the 69th, which is as follows:—"No person shall be entitled to institute proceedings in any Court whatsoever, to recover possession of any claim or of any share therein, or to recover damages for or to restrain the occupation of or encroachment upon such claim or any part thereof, or to obtain any relief as tenant in common, joint tenant, co-partner, or co-adventurer against his tenant in common, joint tenant, co-partner, or co-adventurer; or to recover any interest or part interest in any water-race, dam, or reservoir used or to be used for or in connection with gold mining, unless such person shall have been the holder of a miner's right at the time when his alleged title to recover such possession or damages or interest, or to obtain such relief, first arose or accrued." In this section the Act provides for legal proceedings in respect of "claims," as distinguished from "interests," in any water-race, dam, or reservoir used in connection with gold mining. The power to grant gold mining leases is given by section 10 in these words:—"It shall be lawful for the Governor to grant to any person, subject to the provisions of this Act, and the regulations, a lease of any Crown land not occupied by the holder of a miner's right or business license, unless with the consent of such holder for mining purposes or for cutting and constructing thereon races, drains, dams, reservoirs, roads, or tramways, to be used in connection within any such mining, or for erecting thereon, any buildings or machinery, to be used for mining purposes, for pumping or raising water from any land mined or intended to be mined upon, or for any or all of those purposes, and also for residence in connection with any of such purposes, for any term not exceeding twenty-one years, and to renew the same for any such term, at the yearly rental of £1 per acre, and upon the terms and conditions prescribed by the regulations."

A power to grant leases for mining purposes, but only with the consent of the owner where the land is occupied by the holder of a miner's right or business license. But the holder of the right under section 9 (2-3) has not occupation of the land, he has the interest and rights already defined only, and consequently he is not a person without whose consent a lease of the Crown land, subject to his right, may be granted.

Nothing is to be found in sub-sections 11-16, which derogates from this view. In fact, section 11 enacting that "Any such mining lease may be made of any land occupied for the purpose of residence or business, by the holder of a miner's right or business license, under the provisions aforesaid, if the person applying for the lease shall make compensation to such holder for any building erected or other improvements made by him or any prior holder on such land," particularly provides for the right under section 9 (4) which deals with possession and occupation of the land.

Sections 62-64 provide for the Warden's duties respecting proceedings before him. Section 62 (the recovery of possession of any gold, earth, land, water-race, drain, dam, or reservoir); section 63, in respect of the right to divert any water, or to remove any reservoir, race, drain, or dam; section 64 (in respect of any encroachment or trespass upon or injury to any such land, race, drain, dam, reservoir, or water), appear advisedly to continue the different interests, using the word land in contradistinction to the other subject-matter, and consequently, bearing in mind the principle involved in the maxim, "*cujus est solum, ejus est usque ad cœlum*," and that lesser rights in the soil, perhaps more properly called interests and easements, have always been known to the law, such as the rights of the copyholder, of common of turbary, of way, and of cutting grass, &c., &c.

Taking leave of the Act, and going to the regulations made under its 97th section which, not being contrary to its provisions, thereby are to have the force and effect of law.

Regulations 60-72 deal with water rights. Regulation 60, as to the mode of application, prescribes an entirely different manner of proceeding in order to obtain the diversion and use of water for mining or general purposes, or cutting races, or constructing dams or reservoirs in connection therewith than that prescribed by the earlier regulations for taking up and dealing with claims. Regulation 30, and part machine areas, r. 31; business and residence areas, rr. 32-33; area for stacking tailings, r. 34; market garden areas, r. 35; alluvial claims, rr. 49-51; quartz reefs, rr. 52-57; river and creek claims, rr. 58-59; tunnelling claims, rr. 73-78; puddling claims, rr. 79-80.

The water right regulations, 61-63, may be passed. Regulation 64 provides for the converse of the right given by section 9 (2), so far as it applies to races, and is as follows:—"Any party of miners may cut any race or drain, for gold-mining purposes, through any claim or over or under any race or drain belonging to any other party of miners, provided that no injury be done to such claim, race, or drain, through or over or under which the first-mentioned race may be cut; and the original line of any race may be altered or deviated from by the consent of the Warden, if no prior right be injured thereby."

Passing on through rr. 65-71, regulation 72, as to dams and reservoirs, is reached. It provides that "Any miner intending to construct a dam or reservoir, to collect and store water therein for mining or general purposes, may apply by notice in writing to the Warden, describing with sufficient accuracy the site and capacity in gallons of the proposed dam or reservoir and the watersheds from which the water is to be collected. Copies of such notices must be posted at the Warden's office and on the site of the proposed dam or reservoir, for seven clear days. If no valid objection be lodged during that period, the Warden may grant to the applicants authority to occupy the site applied for and a right to cut drains on the watersheds described, or such portions thereof as he may think fit, for the purpose of collecting the water therefrom; and the applicant shall thereupon be deemed to have an exclusive right to such water, provided no public interest or prior right is injured thereby," thus prescribing the manner of application to construct a dam or reservoir, but at the same time only enabling the Warden to grant the applicant authority to occupy the site applied for, and a right to cut drains on the watersheds described for the purpose of collecting the water therefrom, and providing that the applicant shall thereupon be deemed to have an exclusive right to

such water—a regulation which carefully avoids giving him the lands, and keeps well within the construction already given to section 9, and concludes by providing that no public interest or prior right is to be injured thereby. The forms are R and S, and are still consistent with this reasoning.

Lastly, though taken out of its order, comes regulation 30—"Any business, residence, or machine area, or site occupied by any dam, water-race, reservoir, tramway, and for stacking tailings, or any other authorised holding in actual occupation, may be mined upon, provided the miners intending to mine thereon shall, before commencing work, compensate the owner thereof for any loss, damage, or injury to the improvements thereon, that may be sustained by him in consequence thereof. The amount of such compensation may be determined by the Warden, or Warden and assessors." In clear words, allowing mining to take place, under the interests defined in section 9 (2).

In the result, all the regulations as well as the sub-sections of the Act, point to the construction so placed upon section 9, and it would be strange if they did not, as the clear and obvious policy of the Act is the obtaining of the gold existing in the Crown lands of the colony from such lands, whereas the opposite construction would disable anyone from obtaining the gold from the land subject to the rights given by section 9 (2, 3).

6 Q.L.J. 107.

The question is answered—Yes.

The plaintiffs will pay the defendant his costs.

Solicitors for plaintiffs: *Wilson, Wilson and Brown.*

Solicitors for defendant: *Lilley and O'Sullivan.*

DECEMBER SITTINGS OF THE FULL COURT.

TINDAL *v.* HETHERINGTON.

5 f. 4 Q.L.J. 61.

Action—Counter-claim—Cost—Certificate of Associate—Entry of Judgment—Meaning of term Plaintiff—Order LIV, r. 1a.—Order XXII, r. 10.—Order XIX, r. 3.

Held, that defendant on counter-claim, where plaintiff on claim has recovered damages even though nominal, is not entitled to the costs of his defence.

Held also, that Order LIV., r. 1A, as to costs of action under £30 does not apply to a defendant who is plaintiff on a counter-claim. *Shrapnel v. Laing*, 20 Q.B.D., 334, then followed.

THIS was a case tried before Mr. Justice Harding, at *Nisi Prius*, for trespass and counter-claim on trespass. The jury found a verdict for the plaintiff, for ¼d. on his claim, and for the defendant for £15 on his counter-claim.

HARDING, J., in delivering jndgment said: I follow the form of judgment in *Hewett v. Blummer*, 3 *Times*, L.R. 221, and adjudge that the plaintiff recover on his claim ¼d., and that the defendant do recover on his counter-claim £15. Judgment to be entered for the defendant for £15 minus ¼d. Costs to follow these events in the usual way, according to the orders of Court respecting costs.

Upon this judgment, the associate's certificate was drawn up, and the Registrar refused to enter judgment.

The defendant took out a summons in Chambers, calling on the plaintiff to shew cause why judgment should not be entered in the above form, with the addition that the defendant should be allowed £ for his costs of defence, and £ for his counter-claim.

Harding J., after hearing *Mansfield* for defendant, referred the matter to the Full Court.

Sir S. W. Griffith, Q.C., Mansfield with him, for the defendant: The question which the Court has to decide is what is the proper form of judgment when the plaintiff has judgment on his claim for a nominal amount, and a defendant on his counter-claim for an amount under £30, the judgment being entered for defendant for the balance, and the Judge making no order as to costs. This resolves itself into two questions, 1,—Is the defendant entitled to the costs of the action? 2,—Is he entitled to the costs of his counter-claim?

Under Order XXII., r. 10, the defendant is entitled to judgment for the balance and such relief as the Court thinks fit. The plaintiff has

recovered ½d., and the final award of the trial is a verdict for the defendant for £15. The defendant was brought here against his will, and had no choice of forum. *Lund v. Campbell*, 14 Q.B.D., 821; *Lowe v. Holme*, 10 Q.B.D., 886; *Shrapnel v. Laing*, 20 Q.B.D., 334, were cited.

The Chief Justice: We are all agreed that the defendant is not entitled to his costs of the action.

Sir S. W. Griffith: With regard to the second point, Order LIV, rr. 1, 1a, 2, gives the defendant relief. Order XIV, r. 6, did not intend the term plaintiff to comprise defendant on the counter-claim. *Blake v. Appelyard*, 3 Ex. D. 195, *County Courts Act*, does not apply to the counter-claim. *Davidson v. Gray*, 40 L.T. (N.S.) 192, was also cited. Order XIX, 3, defines the rights of a defendant. Throughout the rules, the defendant is called defendant, and not plaintiff by way of counter-claim.

Harding J.: The interpretation clause of *The Judicature Act* describes *plaintiff as including every person seeking relief otherwise than by way of counter-claim as a defendant.*

Real, Byrnes with him, for the plaintiff: There are two interpretations, one for the Act and one for the rules. In the formal procedure, the defendant on a counter-claim is a plaintiff. Order XXII, r. 5, and appendix, C. 12.

Plaintiff is *actor* whether claiming in original action or on counter-claim; the pleadings are distinct and triable in different localities. S. 20 of *The Judicature Act* draws a distinction between the Act and the schedule.

THE CHIEF JUSTICE: We are of opinion that there are two causes of action distinct from one another, and so follow *Shrapnel v. Laing*. The defendant is not entitled to the costs of the action. With regard to the costs on the counter-claim, in the face of the definition of a plaintiff, in the interpretation clause of *The Judicature Act*, we hold that the defendant is entitled to his costs. There will be no costs of this or the order made in Chambers.

Solicitors for plaintiff: *Hart and Flower.*

Solicitors for defendant: *Foxton and Cardew.*

KENNEDY *v.* MACMAHON.

Policy of Insurance—Renewal of Policy—Unstamped Receipt—Stamp Duties Act, s. 8—Powers of Amendment—Justices Act, ss. 48-412.

Held, that a document renewing a policy of insurance, is not a fresh policy, but merely a receipt, and as such, requires a penny stamp.

Real, Byrnes with him, moved absolute a rule *nisi*, calling on J. MacMahon and P. Pinnock, P.M., to shew cause why an order of 3rd November, 1888, made by the said P.M., should not be quashed, and why the said J. MacMahon, should not pay the costs, on the ground, that the evidence did not shew that the plaintiff had issued a policy. A policy of insurance had been renewed; a document purporting to be a renewal of the policy, was handed to the insured without a stamp Information was laid against the plaintiff, for a breach of *The Stamp Duties Act*. A conviction was obtained in the Police Court. The appeal was to quash the conviction. *Real*, in moving the rule absolute, cited *Salvin v. Jones, 6 East., 571;* judgment of *Ellenborough, C.J., p. 578.*

Sir S. W. Griffith, Q.C.: This is an action brought for a breach of *The Stamp Duties Act*, s. 8, in, that the plaintiff renewed a policy of insurance, and did not affix a stamp at the rate of 1s. per centum, as required by the schedules of the said Act. *The Justices Act*, s. 214, gives the Court power of amendment, so as to meet the want of a penny stamp on the receipt; although the conviction was for the renewal of a policy, without the stamp proportionate to the amount, as per schedule. In *Salvin v. Jones*, the case of *Tarleton v. Stainforth, 5 Term*, Rep. 695, is quoted, where 15 days' grace was allowed, after the expiration of the policy, but here, there is no such indulgence. *Bacon v. Simpson, 3 M. & W., 78*, is pertinent. The original policy lasted for 12 months only; a fresh agreement was necessary for its renewal. This agreement was evidenced by a printed receipt. A document was issued, purporting to be a receipt, but unstamped. In *Reed v. Deere, 7 B. & C., 261*, there were two docu-

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ments—the first stamped, the second not; but in this case, there were variations. If the document was not a policy, it was an agreement; if not an agreement, it was a receipt; but it is submitted that it was a policy, and that it was liable to a stamp duty of £2 10s.; that the defendants had overreached themselves, and that the conviction be sustained.

King followed.

Real was not called on to reply.

THE CHIEF JUSTICE: In my opinion it is impossible to separate the two documents. They both bear the same number, and embody the same terms. The first instrument, dated September, 1887, was a contract of insurance, from 18th August, 1887, to 18th August, 1888, which was renewable on the payment of £12 10s. for the next year, and was also, renewable from year to year. This renewal depended on the payment by one party, and acceptance of the payment, by the other. On the 18th August, 1888, the insured paid a second premium, and the second instrument must be taken as evidence, that the insured has paid a further premium of £12 10s. The instrument was thus manifestly, not a new and distinct policy, but it was an acknowledgment that the conditions of the first policy had been fulfilled; and from that point of view, it was a receipt for money, which should have had a penny stamp placed upon it. The case should therefore, have been dismissed by the Police Court. As this is a penal proceeding, the Court does not feel inclined to amend the information, and it would be rather a ~~strict~~ strained exercise of its undoubted powers, if they in effect, charged the defendant with what would practically, be a new offence. The appeal will be allowed with costs, and the conviction, under the statute, will be quashed.

HARDING, J., and MEIN, J., concurred.

Solicitors for defendant: *MacDonald-Paterson, FitzGerald, and Hawthorn.*

Solicitor for Crown: *J. H. Gill.*

Re THE WILL OF JAS. GIBBON, DECEASED.

Will—Executor—Commission—Legacy to executors—Illusory bequest—Election — Probate Act, s. 6.

Held, that an executor's commission should be reasonable, and the Court has discretion to fix the amount.

Held, also, that an inadequate grant may be construed as illusory, and as an attempt to oust the jurisdiction of the Court.

THIS was an appeal from an order of Mr. Justice Harding, in Chambers, allowing the executor of the will commission, so far as it allowed commission.

HARDING, J., allowed a commission of £½ per centum, on £92,964 18s. 1d., the amount lying in the bank; a commission of £3 10s. per centum, on the difference between £196,942 13s. 2d., the amount collected, and £92,964 18s. 1d.; and £½ per centum, on £4,625 1s., the estimated value of shares, transferred to the beneficiaries.

Byrnes, for the residuary legatees, opposed the commission in Chambers, stating, that the testator had left a legacy of 15 guineas, to each of the three executors, per annum, while the trusts were being executed, as an acknowledgement for their pains and trouble. The trusts might last 20 years; the beneficiaries offered H. W. Lamb, the executor, a lump sum of £1,000, before he left England. The shares were all sold by Cottell, the auctioneer, at a commission of £1¼ per centum.

HARDING, J., in allowing the commission: I think the bequest to the executors and trustees, is so insignificant, as compared to the responsibility imposed, that it must be considered merely as a compliment, or an attempt to evade the power of the Court to give a commission.

From this there was an appeal to the Full Court.

Byrnes, *Wilson* with him, for Henry Gibbon, C. T. Gibbon, and some thirty others, residuary legatees, submitted that the executor being a legatee, was bound to make his election.

The facts as stated above, were reiterated. In support of the contention, the following cases were cited: *Freeman v. Fairley*, 3 Merivale, p. 24.

In re Fullarton's will, 6 N.S.W.L.R., P. & D., 15; *In re the will of Richmond*, 1 P.&M., 16.

Wilson followed, and cited: *In re Stanway*, 9 Vic. L.R., 1 P.&M., 36; and *In re Riley*, 4 Vic., R., 28.

HARDING, J., referred to *Re the will of F. Murray*, June 5th, 1874, where the Full Court held, that in ordinary cases, 2½ per cent. commission is sufficient to allow. Circumstances under which a larger commission should be allowed, were also considered.

Sir S. W. Griffith and *Rutledge*, for the executor, were not called on,

THE CHIEF JUSTICE: The principle is clear, that when an executor receives a legacy for his labour and trouble, he ought not to get a further allowance by way of commission, but the Court will look to the substance of things, and for collecting £200,000, a legacy of 15 guineas, is nothing like even the shadow of remuneration. The Judge in Chambers has considered this, and in one instance, he has allowed only £ ½ per cent. instead of £1 per cent., which is usually regarded as reasonable. I consider the amount by no means unreasonable, and that the appeal should be dismissed with costs, to be paid out of the residuary estate.

HARDING, J.: The Court, although it follows a rule, will never carry it to an absurdity. In the Court below, I considered the legacy of 15 guineas, as an attempt to evade the rule of Court, that where an executor receives a legacy, he could not have his commission.

MEIN, J., concurred.

Solicitors for executor: *Hart & Flower*.

Solicitors for residuary legatees: *Wilson, Wilson & Brown*.

ELECTIONS TRIBUNAL.

17th and 21st September, 1888.

ELECTION FOR WIDE BAY.

FLOOD v. TOZER.

Cor:—LILLEY, C.J., Elections Judge and Assessors—Messrs. Rees R. Jones, Geo. Agnew, Robert H. Smith, Wm. Stephens, Arthur Morgan, and E. Palmer, MM.L.A.

The facts are as follow: An election for the Electoral District of Wide Bay was held on the 17th May, 1888. The petitioner, John Flood, and the respondent, Horace Tozer, were the contestants, and the latter was returned as duly elected. The returning officer declared the following numbers of votes to have been polled for each candidate:—for Flood, 268, and for Tozer, 281.

The petitioner prays in his petition that it might be determined that the respondent was not duly elected or returned, and that the petitioner was duly elected and returned, and that the petitioner might be declared to be the sitting member for the Electoral District of Wide Bay, in the Legislative Assembly.

The following grounds were alleged in the petition:—That these were two instances of electors who appeared to have voted at more than one polling place, and each of the votes was given in favour of the respondent; that one person not on the roll voted in favour of respondent; and that one person personated an elector, and gave the vote in favour of the respondent. It was further alleged that, at Tewantin, a duly appointed polling place for the election in question, 36 votes were polled, of which 7 were recorded for the petitioner, and 29 for the respondent, and that all these ballot papers were informal under section 76 of the *Elections Act of 1885*, and should have been rejected, whereas they had been all accepted, allowed and counted.

Upon the packages being opened by the Clerk of the Legislative Assembly before the Tribunal, the Tewantin votes were found to be all marked by the returning officer with the word and letters,

"W.S. Quinton," instead of with his initials only. At Imbil 19 votes were polled for the petitioner, and 6 for the respondent, and all were marked by the returning officer, "F. Chas. W." At Glastonbury, on 24 valid votes polled for petitioner and on the 14 for respondent, the returning officer had surrounded his initials, "C.B.," with a circle.

Power appeared for the petitioner; *Lilley & Byrnes* for the respondent.

The Assessors, and the Shorthand Writer, being duly sworn by the Registrar of the Court, the petition was read.

Power opens petitioner's case.

Lilley moves that the objections to the Tewantin votes be first heard.

Evidence taken. Election returns, ballot and other papers produced by the Clerk of the Legislative Assembly. Amongst others were 36 ballot papers polled at Tewantin, of which 7 were for the petitioner and 29 for the respondent.

The Assessors examined the 36 ballot papers polled at Tewantin, *seriatim*, to ascertain the method of marking them; also the votes polled at Imbil and Glastonbury.

It was admitted by counsel, that 29 of the Tewantin votes were for respondent, and 7 for petitioner.

Lilley asked that the ballot papers polled at Gympie should be opened, until No. 124, alleged to be in duplicate, should be found.

The assessors agreed to this proposition.

LILLEY, C.J.. ordered the Registrar to open the papers, until he should find the one or more votes marked No. 124.

This was done accordingly.

Lilley opens respondent's case in defence and in recrimination, and calls evidence.

21st Sept.—*Power* consents to take the decision of the Tribunal on the Tewantin votes first.

LILLEY, C.J., to the Assessors: My opinion is that the 36 votes at Tewantin virtually decide the matter, because, if they are bad, the petitioner will succeed. I have been considering the matter, and, if the assessors take my view of the law, other evidence in the case will not matter. If the 36 votes at Tewantin are bad, the other votes are bad; because any mark beyond the initials would, under the literal interpretation of the statute, invalidate the votes; and they ought to be rejected. But that does not appear to be the rule of interpretation in England. There the judges seem to have considered this—whether by means of the mark, or the irregularity, the individual votes could be detected. Now, here, all the papers are in the same condition and an individual voter could not be detected; so that in my view of the law, the 36 votes at Tewantin were very properly allowed by the returning officer, and, if they are good, the votes at Imbil and Glastonbury are good also. No doubt, by the literal and absolute interpretation of the statute, there ought to be nothing on the papers, but the returning officer's initials, and the figure on the turned-down corner. In this case all the voters are in the same condition: an individual voter could not be singled out from the rest by means of that irregularity. The presiding officer put his signature on all the papers in the same form; and most of the votes went the same way. There are many cases determined, and decisions given in the English Courts, as to irregular marking of ballots:—*The Wigtown case*, Cunningham on Elections, p. 113. I state to you, gentlemen, what my view of the law is; it is open to you, of couse, to disregard that view, and you may override it. You may disregard my decision, and, notwithstanding my interpretation of the law, "guided by the real justice and good conscience of the case," you may consider that the petitioner ought to succeed, and I may say that an objection of this kind, which could not possibly affect the validity and the secrecy of the votes, should prevail. I will ask you, gentlemen, whether you think so, as to the 36 votes at Tewantin; because if it is conceded, they will determine the whole matter.

Lilley referred to *The Stepney case—Woodward v. Sarsons*, L.R., 10 C.P.

LILLEY, C.J.: This is a question of fact for the Assessors. The mischief that might arise from a

literal dealing with the Act would be this: An election would be hardly possible, if, when a man accidently dropped a spot of ink, or inadvertently made a pencil mark on a paper, the Tribunal should say, it was done with the intention of distinguishing a vote, or in contravention of the Act. The question here is: Has the mischief, which the statute tries to prevent, arisen, or is it likely to arise? Was the identity of the votes made known, or was that secrecy which the law prescribes, violated? If so, the papers should have been rejected. But here they are all alike; and it does not seem to me that any individual votes can be distinguished from any other votes. That being so, my view of the law is in accordance with the spirit of the English decisions, and with what I think is common sense.

Mr. Jones, for the Assessors, stated that they were unanimously of opinion that the Tewantin votes were valid.

Lilley asked for the dismissal of the petition with costs.

Power submitted that this was a case of first impression under a new Act, and before a new Tribunal; and, as the petition was neither frivolous nor vexatious, costs should not be allowed against the petitioner. It had been a close election, concluding with a majority of 13 votes. Anyone reading the Act, and with a knowledge of the facts of the election, would be justified in bringing the petition.

Mr. Jones, for the Assessors, stated that they thought the costs should follow the event.

LILLEY, C.J.: The Tribunal determines that the petition be dismissed with costs against the petitioner.

Declare that the petition be dismissed with costs, and that Mr. Tozer is duly elected and returned as member for Wide Bay.

Solicitors for petitioner: *Chambers, Bruce & McNab*, agents for *Power*, Gympie.

Solicitor for respondent: *Osborne*, agent for *Conwell*, Gympie.

IN CHAMBERS.

HARDING, J. 7th December, 1888.

Re THE COMPANIES ACT, AND *in re* THE QUEENSLAND CO-OPERATIVE PASTORAL COMPANY LIMITED.

The Companies Act, s. 92—Rule 18. Remuneration—Clerical Assistance.

Held that the reasonableness of a grant of clerical assistance in winding up a Company should be considered in fixing the Official Liquidator's remuneration.

THIS was a summons taken out by the solicitors of the Official Liquidator, applying for an order for clerical assistance.

The affidavit of the Official Liquidator stated that he had been employing an assistant at the remuneration of £20 a month, owing to the stress of business connected with winding up the company, and that without such further assistance the ordinary staff of clerks employed by the Official Liquidator would have been insufficient.

HARDING, J.: The order is granted, the question of the reasonableness of the summons to form a matter for consideration on passing the Official Liquidator's accounts. The amount of such remuneration is to be taken into consideration when the Official Liquidator's remuneration is fixed, with the object of considering whether the same should be reduced on account thereof. Costs of the application to be costs in winding up.

Solicitors for the applicant: *Hart & Flower*.

HARDING, J. 12th December, 1888.

Re THE WILL OF JAMES GIBBON, DECEASED.

Petition for Appeal to Privy Council—Security—Form of Order.

Leave on appeal to Privy Council either to give security or to pay £500 into Court in lieu of security.

Leave to respondent to carry into execution order appealed from, on giving security—before appeal approved—for due performance of judgment of the Privy Council.

THIS was an application by the residuary legatees of the above estate, for leave to appeal to the

Privy Council against a judgment of the Full Court.

Byrnes applied to HARDING, J., to sit as Full Court in vacation.

Rutledge for executor.

Order,—leave to appeal on petitioners giving security in the sum of £500, to the satisfaction of the Registrar, for the due prosecution of the appeal and the payment of all such costs as may be awarded by Her Majesty, her heirs and successors, or by the Judicial Committee of Her Majesty's Privy Council, to the respondent. The petitioners are to be at liberty to pay £500 into Court, in lieu of security.

Let respondent be at liberty to carry into execution the order appealed from, upon giving good and sufficient security to the satisfaction of the Registrar, for the due performance of such judgment or order as Her Majesty, her heirs and successors shall think fit to make on such appeal. If such security be not given before appeal is approved, let the execution of the order be suspended.

Solicitors for petitioners: *Wilson, Wilson & Brown.*

Solicitors for respondent: *Hart & Flower.*

HARDING, J. March 4th, 1889.

HUNTER AND ANOTHER *v.* MILES AND OTHERS.

Practice—Special case—Married woman—Order XXXIV, r. 4—Statement of Council—Sufficient evidence.

Held, that the statement of Counsel, with concurrence of other side, that the statements contained in a special case are true, so far as the same affect the interest of his client, a married woman, is sufficient evidence within the meaning of Order XXXIV, r. 4.

Elwes v. Elwes, 20 W.R., 480, followed.

Summons for leave to set down a special case for argument in which a married woman was plaintiff.

Wilson, for the plaintiff, applied as per summons, and stated that the statements contained in the special case, so far as the same affected the interest of a married woman, were true, and submitted that the statement of Counsel was sufficient without an affidavit, and cited *Elwes v. Elwes*, 20 W.R., 480.

The solicitor for the defendants concurred in the statement.

HARDING, J.: Order accordingly, before next Full Court.

Solicitors for plaintiff: *Hart & Flower.*

Solicitors for defendants: *Chambers, Bruce & McNab.*

HARDING, J. March 15th, 1889.

ZAHEL *v.* BUCHAN.

Practice—Leave to proceed on service out of jurisdiction—Final judgment—Bill of costs—Order XIV., r. 1a.—Costs Act, 1867.

FORM of order for final judgment on a solicitor's bill of costs.

Smith v. Eldred, W.N., 1888, p. 221, followed.

Osborne, for the plaintiff, applied for leave to sign final judgment on a solicitor's bill of costs, service having been effected without the jurisdiction. An affidavit of service, and an affidavit of the cause of action, having been read, the following order was made, based on *Smith v. Eldred*, W.N., 1888, p. 221; 22 Q.A.J. 10.

HARDING, J.: *Order*,—that the bill of costs on which this action is brought be referred to the Taxing Officer, pursuant to the *Costs Act, 1867*, and that the plaintiff give credit, at the time of taxation, for all sums of money received by him from or on account of the defendant, and let the plaintiff be at liberty to sign judgment for the amount of the Taxing Officer's allocatur in the said taxation, and costs to be taxed.

Solicitor for the plaintiff: *Osborne.*

NAUMBERG *v.* EXECUTORS OF ALBERTSON.

November 30th, 1888,
February, 1889,
March 6th, 1889.

Landlord and Tenant—Lease—Covenant not to Assign — Re-entry — Waiver — Forfeiture — Real Property Act, 1861, ss. 43, 71, 73, 104 —Unregistered Instrument—Equitable Mortgage.

P. and S., being registered proprietors of an estate in fee simple in certain land under *The Real Property Acts*, demised the same for a term of 14 years to B., who afterwards assigned to C., who subsequently assigned to A. The original lease contained a covenant in these words: "And the lessee further covenants with the lessors, that he will not without leave assign or sub-let." The two above-mentioned assignments were made with the consent of the lessors. A. afterwards made a bill of sale to F., Q. and Co. and Q., G. and Co., and therein assigned the lease to them by way of mortgage. The lessors never gave leave to A. to make this assignment, and the instrument was never registered.

Held, that an equitable mortgagee or encumbrancee under our law, who has not registered his assignment or security, is in the same position as an equitable mortgagee in England, who has not completed his security by foreclosure; that the unregistered equitable assignment did not pass the legal interest, and that there had been no forfeiture by A.

Held, also, that if the words of a proviso for re-entry do not clearly refer to the terms of a negative covenant, no re-entry can be made.

Real and *Lilley* appeared for the plaintiff, and *Sir S. W. Griffith, Q.C.*, *Shand* with him, for defendants.

The facts of the case are sufficiently stated in the judgment below.

The following cases were cited by counsel:—

For the plaintiff: *West v. Dobb*, L.R., 5 Q.B., 460; *Hyde v. Warden*, 3 Exch. Div. 72; *Moares v. Choat*, 8 Simon, 508; *Doe v. Bevan*, 3 M. & S., 353; *Doe v. Laming*, Ry. & Moody, 36; *Doe v. Hogg*, 1 Car. & P., 116; *Crusoe v. Bugley*, 2 Wm. Blackstone, 766; *Cox v. Bishop*, 8 Macn & G., 815; *Moore v. Gregg*, 2 De G. & S., 304; *Britain v. Rossiter*, 11 Q.B.D., 123, 129; *Wilmott v. Barber*, 15 Ch. D., 96; *Real Property Act, 1861*, ss. 43, 71, 73.

For the defendant: *Wadham v. Postmaster-General*, L.R., 6 Q.B., 644; *West v. Dobb*, L.R., 5 Q.B., 460; *White v. Hunt*, L.R., 6 Exch., 32 *Walsh v. Lonsdale*, 21 Ch. D., 9; *Wogan v. Doyle*, 12 Ir. L.R., 69; *Woodfall*, Edit. 13th, p. 660; *Real Property Ac , 1861*, ss. 71, 73, 104.

C.A.V.

LILLEY, C.J., delivered judgment as follows:—This action is brought for the recovery of land in Queen Street, into the possession of which land the plaintiff claims to be entitled to re-enter for breach of covenant by the defendant. The plaintiff's alleged right to enter, is said to arise out of the following circumstances.

Petty and Somerset were registered proprietors of an estate in fee simple, in the land under our *Real Property Acts*. By a lease dated the 18th December, 1880, they demised the land for a term of 14 years, from the 1st December, 1880, to Henry Biggs, who afterwards assigned to G. E. Cooper, who subsequently, assigned to the defendant Albertson The original lease contained a covenant in these words—"And the lessee further covenants with the lessors, that he will not without leave assign or sub-let." The lessors, Petty and Somerset, gave leave for the assignment to Cooper and Albertson, and no serious question arises upon them. The real contest between the parties, arises on the following instruments. On the 14th October, 1884, the defendant Albertson, made a Bill of Sale to Fitzgerald, Quinlan and Co., and Quinlan, Gray and Co., and therein assigned, set over, and transferred the lease and term of years to them by way of mortgage, subject to a proviso for redemption, on repayment of the mortgage money. Petty and Somerset never gave leave to the defendant Albertson, to make this assignment, and I find that neither they nor Naumberg ever acquiesced in, or waived their right to treat it as a forfeiture of the lease, if in law the iustrument was sufficient to operate a forfeiture. The fact that the transfer by Albertson to Quinlan and Co. is dated the 14th October, a day before the assignment by Cooper to Albertson, is, I think, of no real consequence. I must take it as against

Albertson and his representatives, that when he assigned to Quinlan and Co., he had the estate in him, at law or in equity, which he assumed to assign. He and his representatives are estopped from denying that fact, when subsequently found entitled and in possession. There is no evidence that the date of either instrument, is the true date of the transaction, and, moreover, under our *Real Property Acts* the date of deposit in the Registry, is the date of the instrument for the purpose of effective transfer, and the deposit and registration of the lease to him, must necessarily, precede the deposit and registration of his assignment of his leasehold to Quinlan and Co. The way is thus clear for the decision of the actual question in dispute: Was there a complete forfeiture of the lease, so as to entitle the plaintiff to re-enter? Before considering that question, it will be well to state the plaintiff's title.

The plaintiff claims as a purchaser from Petty and Somerset, of the estate in fee in the land, and of the reversion, under a memorandum of transfer of the 28th August, 1886, and a certificate of title issued thereon. Whatever title or right of re-entry Petty and Somerset had at that time, the plaintiff claims, as they had done nothing to waive the alleged forfeiture. Was there then a forfeiture? All the instruments of title have been registered under the *Real Property Acts*, except the assignment by Albertson to Quinlan and Co. With respect to that instrument, it remains unregistered, and has not been endorsed on the lease. As the legal estate in land under the *Real Property Acts*, passes only by registration, it is still in Albertson (or in his name, as he is dead,) and it has not passed to Quinlan and Co. by registration. The effect of the unregistered assignment of 14th October, 1884, was, I think, to give to Quinlan and Co., at least an equitable mortgage, and perhaps a claim to be registered as mortgagees or encumbrancees, under section 48 of the *Real Property Act*, 41 Vic., No. 18. They have not, however, made any application to be registered, nor deposited the assignment in the registry. In England, the instrument of 14th October, 1884, would effectually pass both the legal and equitable estate in the land, and create a forfeiture But here, as I have said, that can only be done completely by registration, I am not unmindful of the fact that Quinlan and Co., under the power of attorney, in the Bill of Sale, could at any moment sign the necessary documents, and register the transfer from Albertson to them; but they have not done so, and thus they continue in the position of equitable mortgagees or encumbrancees, with power to convert their equitable interest into a legal one as mortgagees or incumbrancees, under the *Real Property Acts*. The principle of the English cases is that, to work a forfeiture, the assignment must be complete, both at law and in equity. The Courts give no aid in the direction of forfeiture. Indeed, in *Crusoe v. Bugley* (2 Sir W. Blackstone) the Court said, "The Courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them." The person seeking to enforce an alleged forfeiture, can have his bond and no more. The word "assign" has been construed to mean legally and equitably assign—that is the legal and equitable estates must both have passed to bring on forfeiture, and to give the right of re-entry for breach of the condition. The English cases, both at law and in equity, seem to decide the principle that a mere equitable mortgage does not create a forfeiture. That being so, our *Judicature Act* has wrought no change. I am not concerned to discuss the propriety of a long ~~cause~~ course of decisions which establish a law that can only be changed by Act of the Legislative Hence, I am constrained to hold in this case that an equitable mortgagee or encumbrancee under our law, who has not registered his assignment or security, is in the same position as an equitable mortgagee in England, who has not completed his security by foreclosure; that the unregistered equitable assignment did not pass the legal interest, and that there has been no forfeiture yet by Albertson.

A minor point was raised as to the effect of a negative covenant. It was said that this being a

negative and not a positive covenant, a promise not to do an act, and not a covenant to do something, there cannot be a right of re-entry for a breach of the obligation under the terms of our *Real Property Act*, because the lessee cannot be said to have made default in the *fulfilment* of a promise *not to do* a particular act. The *dicta* of two or three English Judges (see *West v. Dobb*, 5 L.R., Q.B.) were cited in support of this argument. There has been no positive decision on the question; but, I think, the only value of those opinions, is to show the anxiety of English Judges to find excuses to evade forfeiture. I agree with Lord Blackburn in *Wadham v. Postmaster-General*, where he said, "I certainly think that where there is a negative covenant, if the parties use apt words and say on the breach of such a covenant, the lessors may have a right to re-enter, then such a right of re-entry is to be upheld." It is not necessary for me to give any positive decision on this point, and what I say, is merely by the way. Every negative covenant has its positive side, at least this one has. If a man promises *not* to transfer his interest, he undertakes a positive obligation to hold his interest in the land during the term. Whether "we have left undone those things which we ought to have done, or have done those things which we ought not to have done," a legal responsibility for a breach of promise may arise, and I think the words of our *Real Property Act*, 25 Vic., No. 15, sec. 71, sub-sec. 2, are sufficiently apt to have given a right of re-entry in this case, if a forfeiture had been incurred by a complete breach of the condition not to assign. In the view I take of this case on the main point, the discussion of the minor issue as to negative covenants, is, however, rather interesting than practically essential. I may observe, however, that, if the words of the proviso for re-entry clearly did not refer to the terms of the negative condition or covenant, no re-entry could be made.

The effect of my decision on the whole matter is to give the defendant judgment with costs.

Solicitors for plaintiff: *Thynne & Goertz.*

Solicitors for defendant: *Hart & Flower.*

IN CHAMBERS.

HARDING, J. February 22nd, 1889.

PATTISON *v.* M'MICKING.

Costs—Taxation—Action—Counter-claim—Senior Counsel's Fee—Refreshers—Three Counsel—Junior Counsel.

SUMMONS to review taxation of Registrar. A summons for leave to sign final judgment had been heard, and leave given to defend. The costs of both parties to be costs in the action.

The action came on for trial at *nisi prius* before Mr. Justice Mein, when the plaintiff recovered £375 3s. 6d., and the defendant £647 on the counter-claim. Judgment was directed for the plaintiff in £375 3s. 6d., and for the defendant in £647, the judgment to be entered for £271 16s. 6d., with costs of, and incidental to, the counter-claim.

The plaintiff applied for his costs, and the judge disallowed them.

An appeal was made to the Full Court to vary the form of the judgment, and was refused.

Byrnes, for the defendant, appeared to support the objections of the defendant to the taxation. First, with regard to the final judgment summons, the plaintiff failed to obtain judgment. The defendant succeeded, and is entitled to his costs.

Lilley, for the plaintiff: The defendant did not get the costs of the action, only of the counter-claim.

Byrnes: Part of the defendant's costs in the action were costs in the counter-claim. *Shrapnel v. Laing*, 20 Q.B.D., 334.

HARDING, J.: The plaintiff failed on his judgment; the defendant succeeded, and got judgment; therefore the defendant should get his costs.

Byrnes: Next, with regard to certain costs of preparing for defence and of counter-claim, including fees other than those on the briefs. These were set down in a lump sum, but were materially reduced by the Registrar. The greater part of this evidence was used for the counter-claim more than for the defence. The Registrar halved the costs all through. This is a wrong principle to act on.

HARDING, J.: A general rule that the costs should be halved is wrong; they should be dealt with in each case. In this case I can't say that the Registrar disallowed too much by striking off a half. The taxation as to this stands.

Byrnes: Next, as to the fees of two counsel on the briefs. The Registrar has halved all the fees, but not on the ground that they are too large. The plaintiff's claim was decided on the first day. The Registrar has allowed half of what the refreshers would have been otherwise. The senior counsel's fee has been halved, and refreshers fixed at two-thirds of half the fee marked on the brief.

HARDING, J.: The whole of the refreshers go to the counter-claim. There is not a rule that half the fees should go to the action and half to the counter-claim in all cases. In this case I can't say the Registrar has decided it wrongly. The taxation as to the brief stands. Refreshers are not necessarily two-thirds of the fee on the brief. The taxation on such refreshers is to be increased to fifteen guineas on the senior's brief, that on the junior's to stand. As to there being three counsel, it has been decided not to allow the third; the junior is entitled to his fees, the middle-man, as through life, must take his share of the spoil as he can. There will therefore be allowed no fees for a third counsel. No costs of either parties to this summons allowed.

Solicitors for plaintiff: *Hart & Flower.*

Solicitors for defendant: *Thynne & Goertz.*

IN INSANITY.

4 Q.L.J. 105.

HARDING, J. April 1st, 1889.

Re THOMAS SHITTLER.

Practice — Declaration of Insanity — Insanity Act, 1884, (48 Vic., No. 8,) sections 76, 78, 90, Rules 12, 13, 14, 17, 55—Service of petition and order.

The date of filing put on the petition by the Registrar is the date of its presentation; it should be answered in the usual manner, and when served it should bear the usual fiat. As this had not been done, an order *nisi* was granted on the respondent to show cause why an order should not be made according to the prayer of the petition

PETITION for a declaration of insanity against Thomas Shittler. Affidavits as to medical testimony were filed. The Curator had received notice of the application, but did not appear.

W. F. Wilson appeared in support of the prayer of the petition for a declaration of insanity against Thomas Shittler. Sections 76, 78, 90, of 48 Vict., No. 8, were cited, also rules 12, 13, 14, 17, 55, of the Rules of Court in Insanity

HARDING, J.: The respondent has not had notice of this application. There is no fiat on the petition. I hold that the date of filing put on the petition by the Registrar is the date of its presentation. It should be answered in the usual manner, and when served it should bear the usual fiat. A different practice seems to have obtained here of late years, but is incorrect.

The following authorities were referred to:—*Pope on Lunacy*, 53, 54; *G. O. in Lunacy, 1853*, r. 7.; 16 and 17 Vict., c. 70, s. 40.

Order *nisi*, returnable on Wednesday, 10th April, on the respondent Thomas Shittler, to show cause why an order should not be made according to the prayer of the petition.

On an application to make absolute the above, the following order was made:—Order according to paragraphs 1 and 2 of the prayer. Further consideration reserved; this order to be served on the insane person, and an affidavit of service filed seven days before any further proceedings are taken.

Solicitors for petitioner: *Macpherson, Miskin and Feez.*

IN CHAMBERS.

HARDING, J. 20th February, 1889.

RE ALEXANDER THOMSON ROSS, DECEASED.

The Trustees and Incapacitated Persons Act, s. 43 —Vesting Order—New Trustee—Heir unknown.

Petition by Elizabeth Ross, of Glengarry, Strathfield, in the Colony of New South Wales, for a declaration that the said Alexander Thomson Ross, might be declared a trustee of the lands mentioned in the petition, within the meaning of the Act, on behalf of the petitioner, and that the lands might be vested in the petitioner for an estate in fee simple, free from encumbrances, and that the petitioner might have such further and other declaration or order made in her favour, in connection with the said lands, as to the Court might seem meet.

Pain, for petitioner, supported petition for a declaration of trusteeship, and a vesting order.

This is an application under s. 43 of the *Trustees and Incapacitated Persons Act*. From the affidavit, it appears that Alexander Thomson Ross, was the registered proprietor under the *Real Property Act* of 1861, and that the said A. T. Ross, died intestate, on 17th March, 1873, and administration was granted to the widow. The deceased left no known heir. *Re Lowrie's Will*, L.R., 15 Eq. 78, is in point.

The application was then adjourned for the filing of an affidavit, verifying the death of Alexander T. Ross.

HARDING J., referred to Morgan, Acts and Orders 97. *Re Cumming*, L.R., 5 Ch. 72.

Order: declare heir unknown, and declare Alexander Thomson Ross a trustee for the lands mentioned in the petition, and that the said lands be vested in the petitioner. (For form, see *Teeton*, p. 506, form 11.)

Solicitors for petitioner: *Hamilton & Hamilton.*

FEBRUARY AND MARCH SITTINGS OF THE FULL COURT.

In the matter of ALEXANDER COSTELLO, a Student-at-law.

Admission of Barrister—Functions of Board of Examiners—Student-at-Law—Reg. Gen. of 7th September, 1880—rr. 20 et seq., and 55, 56.

The Board of Examiners for Barristers may at any time during studentship, and either before or after final examination, investigate the moral fitness of a candidate for admission to the Bar. Final examination consists of examination into both the knowledge of law and moral fitness of the student, and it is open to the Board to make either first. Persons not of good fame and character at time of final examination are not qualified for final admission. Notwithstanding his admission as a student, the Board have ample power to enquire into the moral character of a candidate for final examination; and it is not necessary to prove a charge against a candidate as a criminal offence. It is sufficient to ascertain whether there is a reasonable foundation for imputing gross and indecent misconduct, and whether he can now be considered a person of good fame and character. The Court has, moreover, a final control over its students and officers, and its Common Law authority over barristers and solicitors can now be exercised over them in either or both capacities, under *45 Vic., No. 5.* By its Common Law jurisdiction, the Court may ascertain whether any of its accredited officers is unfit to be so accredited.

In re Blake, 30 L.J., Q.B. 32., followed.

It may be a subject of consideration by the Court whether misconduct shall be a perpetual bar to admission.

Application by Mr. Costello, a student-at-law, on the 11th February, 1889, before The Chief Justice at Chambers, on his own petition, praying that the Court would order his papers at the final examination in August, 1888, at which he had failed to pass, to be reviewed side by side with the papers of the successful candidate thereat; or that the Board of Examiners for Barristers should be ordered to admit him to his final examination, which they had declined to do in November, 1888, on the ground of moral unfitness; or in the alternative that the Board should be ordered to pay him £1,422 0s. 9d., expense incurred and loss suffered in preparing for examination.

Costello appeared in person.

Chubb, Q.C., Lilley with him, for the Board, in support of their action, and to oppose the petition.

Lilley, J.C., upon petitioner refusing to strike out the prayer for damages, referred the petition to the Full Court, sitting on the following day, directing it to be put in the list along with other professional matters.

The petition accordingly came on for hearing on 12th February.

Costello appearing in person.

Chubb, Q.C., Lilley with him, appeared for the Board, to oppose the petition.

The facts of the case are very fully stated in the judgment of the Court, which was delivered as follows, by

HARDING, J.: This is a petition of Alexander Costello, student-at-law, presented to this Court, praying that his papers at the final examination, held in August last, be reviewed side by side, with the papers of the successful candidate at that examination. I will term that, the first portion of the prayer;—or that he be admitted to the final examination;—I will call that the second portion There is a third—that in the alternative, the said Board of Examiners be ordered to pay him the sum of £1,422 0s. 9d., the pecuniary loss suffered by him up to the hearing of the said petition.

As to the first part of the prayer—the review of his papers, side by side with some other papers, —I know of no rule, which allows such a thing, or of any right to call upon the Court to do so. If, unfortunately, some gentleman has got in without having properly passed his examination, which I do not for a moment suggest, it is no reason why Mr. Costello should get in without passing his examination; so that under no condition, should that part of the prayer be granted.

I pass on to the third portion of the prayer; as to that, I know no provision by which Mr. Costello, if he has any right against the Board for damages, can recover them other than the ordinary way in which a man can recover damages against any other man. I see no jurisdiction to deal with that matter. That part of the prayer I consider gone.

As to the second, that he be admitted to examination, I propose to deal with that more at length; and possibly, for that, some parts of the case should be investigated. Mr. Costello has for a number of years, since 1879 apparently, been struggling to obtain a position at this bar, and his efforts culminated in August, 1888. Previously to that time, it may be well here to mention, in March, 1884, he appears to have been admitted as a student-at-law, and to have signed the roll. Before that, it appears that some papers were obtained by the Board of Examiners for Barristers from the Education Department, and that some question as to immoral conduct by the petitioner, was investigated by the Board. That is said to be the same question as that which I shall subsequently come upon. Having become a student-at-law, he continued so, and in July last, having sent in his notice to be examined for the final examination in August, 1888, the Board wrote him a letter, in which they told him the days on which the examination would take place, and that if he wished them so to do, they would enquire into the matter before his examination. He says he answered that, and said he would be fully prepared to meet the charge, when occasion arose. He says, "I do not wish the Board to do so, for the reason that the same allegation has been raised, fully investigated, and solemnly adjudicated on, previous to my admission as a student-at-law." At that examination he failed; and then he gave notice to the Board of his intention to be examined, on 17th October, 1888. Immediately on his so intimating to the Board, he received a letter from the Board, refusing to examine him for his final examination, until they had held an enquiry as to his moral fitness to practise. In answer to that, he writes a letter setting up his reply that the matter had been adjudicated on. Then he gets a letter,—

Supreme Court Library, Brisbane,
1st November, 1888.

A. Costello, Esq.,
Merton Road, South Brisbane.

Sir,—I have the honor to inform you that I have been directed by the Board of Examiners for Barristers to acknowledge the receipt of your letter of the 30th ult., and also to inform you that an allegation has been made to the Board that you were on or about the third (3rd) day of January, 1878, dismissed from the Public Service for gross and indecent misconduct admitted by you to the Under Secretary of the Department of Public Instruction, in which Department you were employed, that the Board will on a day to be fixed be prepared to enquire into the matter.

I have, &c.,
ROBT. THORROLD,
Sec. to the Board.

The 5th November being the day on which the examination as to knowledge was to take place, in defiance of that letter, he presented himself on that day for examination. That was refused. Upon that, a few days afterwards, the 16th, he applied on petition, to His Honor The Chief Justice, praying that he would be pleased to order that the Board proceed to examine the petitioner.

Upon that The Chief Justice refused the application, holding that the Board of Examiners could at any time during studentship, and either before or after examination, enquire into the moral fitness of candidates. The right was reserved for student to apply for special examination if the enquiry failed to establish moral unfitness. In compliance with that order, the Board seems to have appointed a day on which they would hold an enquiry, and notified the petitioner. Petitioner says he attended that enquiry, which was adjourned without mentioning any time. After that, there appears to have been a further meeting, at which a gentleman was asked if he could give evidence or not, and he said, not. Then we have the following resolution, the paragraph of the petition in the 23rd,

The Board having enquired into the matter, are unanimously of opinion that Mr. Costello is morally unfit to practise as a barrister of the Court, and they therefore decline to examine him for his final examination, and it is further resolved, that a copy of this minute be forwarded to their Honors the Judges, through The Chief Justice's Associate, respectfully pointing out that the rules contain no provision for removing Mr. Costello's name from the student's roll book.

I feel a little embarrassed as to that, because the statement from Mr. Chubb was not on affidavit. We can, of course, hardly deal with it, being verbal. It was not denied by the other side. It was to the effect that Mr. Costello had so acted at first, by declining to take part in the enquiry, and by absenting himself subsequently, that it was like an undefended case, where the matter goes on at defendant's peril when he does not appear. That can be set right; my judgment will take that shape, if Mr. Costello's statement of the case does not concur with it. At present it stands that there is a decision by the Board against Mr. Costello's fitness to be called, on the ground of want of morality. I think the Board had a perfect right to decide which part of the final examination should be taken first, because it is manifest that two parts of an examination cannot be taken at the same instant, and a dominant power has the right of saying what part shall be taken first. Now, a final examination implies an enquiry into the legal knowledge and fitness of a student, and into his fame and character. These two must involve two enquiries, and it is open to the Board to say which shall be taken first. If they said the examination as to knowledge was to be taken first, and he failed, it would be unnecessary to enquire into his fame and character, and *vice versâ*. There, I think, it was entirely open to the Board to require that that part of the examination should be carried out first, and on failure, to decide to go no further.

With regard to the powers of the Board on whose certificate an applicant should be admitted to this Court to enquire into his fame and character, I would say a few words. The words "good fame and character" are used in the rules only. You come to the "general" rules, from No. 60 to the end, and there you have it that the allegation must be as to "moral unfitness;" before that the enquiry must be as to "good fame and character." These words come from an old Act relating to the Supreme Court, so long ago as 11 Victoriæ, No. 57, which enacted that, no candidate, however qualified in other respects, should be admitted unless a person of good fame and character. So that for upwards of 40 years in this Colony, it has not been the practice to admit persons to the bar, unless they are of good fame and character; not at some period, but at the time at which they are finally admitted.

Now the contention of the petition in this case is, that at the final examination, he could not be examined as to the matter of his good fame and character, which had been investigated in the enquiry at, to that matter, when he was admitted a student-at-law. Now, there is no doubt, that very great weight should be given to the maxim, *nemo debet bis vexari*; it has been found advisable to follow these maxims, as between party

and party, in the final administration of the law; but when the law is contained in a single document, then we must gather from that document, whether it is intended that any maxim, however powerful outside it, is to interfere with and override its manifest interior language. If it appears here that from the time of application for admission as a student, until final admission as a barrister, the applicant is to be in the hands of those who are to admit him, the maxim will not assist him. Now the rules as to students, are Nos. 30, 31, 32 and 33.

30. Every person applying to become a student-at-law, must be of good fame and character, &c.

32. If the Board is satisfied that such person is a fit and proper person to be admitted as a student-at-law, and has complied with the regulations, they shall certify the same * * * in the form F,

which entitles him to sign the student's roll book.

The Board in power at the time, allowing him to sign the roll, must be satisfied that he is a person of good fame and character, and at the time of the final examination, and at any other time during his studentship. By section 63

When any allegation as to moral unfitness of any person applying to become a student-at-law, or to practise as a barrister of the Court, is made to the Board, the Board shall take such steps for enquiring into the matter referred to, as they may deem necessary and proper; and if such allegation is in their opinion proved, the Board may in their discretion, subject to such an appeal as is provided in rule 14, refuse to grant a certificate to the candidate.

So that at any time, when an allegation is made, an opportunity arises for an investigation of the allegation by the Board. But at the time the student is ready to pass his last examination, then he has to do this, under rule 20,—

Every person applying to be admitted to practise as a barrister in the said Court, not previously admitted as a barrister, or advocate in any one of the Queen's Superior Courts of Record in Great Britain, or Ireland, or Australian Colonies, must be a natural born or naturalised British subject, of the full age of twenty one years, of good fame and character, and shall, during the year next preceding the time he submits himself for examination, at any final examination, have been a student-at-law resident in the Colony of Queensland.

Then under rule 21,—

The Board of Examiners shall, two days at least previous to the application of any person to be admitted to practise as a barrister of the said Court, deliver to him, if they are satisfied of his fitness to be admitted to practise as a barrister, a certificate, in the form B, in the schedule to these rules.

But they are to be satisfied then of his fitness to be admitted; that is, that he is then of good fame and character. Further on,

Before delivering such certificate, the Board shall satisfy themselves, that the applicant has fully complied with these rules, and may, if they think fit, require further proof respecting any matter hereby required at any time to be proved by the applicant.

In other words, if they think fit, they may act upon a finding of the Board who gave the certificate for admission to studentship, or they may require something beyond that certificate; and if they require something beyond that certificate, the student must furnish it at his peril. That being so, I think that the Board have power up to the very last moment before the student is admitted at this bar, to require evidence of his good fame and character. Not knowing in this case what the delinquency is, one is unable to say whether or not the decision of the Board is right, but the Board being appointed by the Court, the Court will *primâ facie* accept that decision as right, and will act upon it. Consequently, the Court to-day finds a decision of its Board to the effect that Mr. Costello is unfit by fame and character to be admitted as a barrister, but that his name stands on the roll as a student-at-law of this Court. The Court on that, directs that a rule *nisi* be taken out at the motion of the Board, calling upon Mr. Costello to shew cause, at the next sittings of the Court, in March next. why his name shall not be removed from the list of enrolment of students-at-law, Affidavits will have to be filed, showing the circumstances by such person as the Board think fit, and they shall be served on Mr. Costello, at least within a fortnight of to-day, and he should have leave to answer these affidavits. By that means, we, the ultimate authority in the matter, will have the opportunity of investigating the charge of want of good fame and character, and upon the result of our finding on that, will follow Mr. Costello's success or non-success in this matter. The matter stands adjourned until March sittings,

to come on with a rule *nisi*, such as I have indicated. Let the Registrar issue the rule.

The application to make absolute the rule *nisi* accordingly came on for hearing on 5th March. In the meantime, petitioner had filed two further petitions on the 27th February, the one praying the Court to deliver final judgment on the issue raised in the petition of 7th February; to set aside for illegality the foregoing judgment delivered by His Honour Mr. Justice Harding; and to order their Honours, "Sir Charles Lilley, Knight, and the Honourable George Rogers Harding," to pay the petitioner the sum of £5,038, the damages he claimed to have suffered by the said judgment; the other praying for an order upon the Board of Examiners to pay to petitioner £5,000, damages. The Court in giving judgment on the rule *nisi*, also gave judgment on the several petitions.

Chubb, Q.C, *Lilley* with him, for the Board, on the petition of the 7th February, and to move absolute the rule *nisi*.

Costello, in person to oppose the rule, declined to enter into the facts connected with his name and character, and relied on the resolution of the Board when admitting him as a student.

The COURT dismissed the two petitions of the 27th February, and reserved their judgment on the application for the rule absolute, intimating their intention of considering the whole matter of Mr. Costello's applications in that judgment.

On the 9th April, the judgment of the Court was delivered as follows, by

LILLEY, C.J.: The record in this matter consists of various petitions, affidavits, letters, and other documents, summarised in a list which we will hand to the Registrar.

The facts, so far as Mr. Costello's relation to the Board of Examiners is concerned, may be stated as follows:—On the 27th October, 1883, he applied for admission as a student-at-law, which application, being amended, was considered by the Board, and (the long vacation intervening,) was adjourned until the 4th February, 1884, when it was resolved that the Department of Public Instruction should be asked for papers touching his dismissal from the public service in that department. On the 1st March, 1884, the papers were submitted to the Board. On the 4th March, the Board further considered the application, and by a majority, after a division had been demanded, it was resolved that Mr. Costello be allowed to sign the roll. Mr. Costello does not seem to have been examined, or to have offered any disproof of the alleged misconduct which led to his dismissal from the government service. On the 26th May, 1884, he signed the roll, and got the status of a student, the certificate required by the rules being issued to him. In November, 1884, in February, 1885, in August, 1885, and in November, 1885, he failed to pass the preliminary examination, but in February, 1886, being again examined, he passed, and on the 18th February, 1886, he obtained the certificate of the Board to that effect. On the 28th June, 1888, Mr. Costello applied to be examined finally for admission to the bar. On the 26th July, his application was considered by the Board, and it was resolved that he be informed that, the attention of the Board having been called to the allegation of his misconduct in the public service, if he so wished, they would enquire into the matter before his examination in August. The Board, we may state, is annually appointed by the Court, and in July and August, 1888, it was not composed of the same gentlemen as in March and May, 1884. Mr. Costello replied in July, 1888, thanking the Board for the information, and stating that he would be fully prepared to meet the charge, should the occasion arise; he stated, however, that he did not wish the Board to do so, "for the reason, that the same allegation has been already raised, fully investigated, and solemnly adjudicated upon by the Board of Examiners for barristers, previous to my admission as a student at law." This statement is not correct; there appears to have been no investigation by the Board into the truth or falsehood of the allegation of misconduct, upon which he was dismissed from the public service, before his admission to the roll of students, and there has been none since, for, although Mr. Costello has at

times denied the charge, he has at other times admitted misconduct of the kind alleged against him; but he has given no evidence, made no affidavit himself, nor in any way explained the nature of the conduct on his part, on which the accusation seems to have been based, although ample opportunity has been afforded him to clear himself, or to explain his conduct, both by the Board, and by the Court. On the 7th, 8th, 9th, 15th and 24th August, 1888, Mr. Costello presented himself for examination, was examined and failed to pass. Afterwards, on the 17th September, 1888, he presented another petition (the third) to the Governor in Council, to cancel his dismissal, and his prayer was refused. At this time, two most important witnesses, Mr. Graham, late Under-secretary for Education, and the father of the girl who was concerned in the charge, were dead. Another witness, the mother, could not be found, and the girl herself was married, and her whereabouts unknown. On the 17th October, 1888, Mr. Costello applied to be examined in the following November. On the 21st October, the papers from the Education Department were laid before the Board, as then constituted. At a meeting of the Board on the 19th October, 1888, it was resolved to inform Mr. Costello, that the Board declined to examine him again, until after enquiry into his moral fitness, under the rules. He was so informed on the 26th October, 1888. Other correspondence followed, and on the 1st November, 1888, Mr. Costello was informed that the Board had decided to enquire into the matter, on a day to be fixed. Mr. Costello did not reply to that letter, but on the 5th November, 1888, he presented himself at the examination room, when he was informed by Mr. Crisp Poole, who was in charge of the examination, that there was no examination paper set for him, and on the same day a letter of complaint from Mr. Costello was received by the Secretary to the Board, notifying also his intention to take steps for an appeal under the rules. Mr. Costello accordingly appealed by petition, to The Chief Justice sitting in Chambers, to order the Board to examine him, which he refused to do, holding that, "the Board of Examiners might at any time during studentship, and either before or after examination, proceed to investigate the moral fitness of candidates." He, however, "reserved to the student, the right to apply for special examination, if the enquiry fail to establish moral unfitness."

On the 21st November, the Board resolved to hold the enquiry, and the Secretary to the Board informed Mr. Costello of the date and hour appointed for holding the enquiry. The enquiry was held on the 23rd November, 1888, at the hour appointed. Mr. Costello was present, and Mr. C. E. Chubb, Q.C., was chairman. The papers referred to in Mr. Thorrold's affidavit, paragraphs 6 and 20, and the exhibit H. to his affidavit, were put in evidence. The proceedings are described in Mr. Thorrold's affidavit, paragraph 28. Mr. Costello, after denying that he attempted to seduce the girl, said he would not deny that the report of Mr. C. J. Graham, the Under-Secretary for Education, was substantially true. That report was made upon Mr. Costello's first petition to the Governor in Council, and it will be found under date of the 22nd May, 1878, and it discloses the nature of the gross and indecent misconduct of which Mr. Costello was accused, and to which he made the chivalrous defence that the girl was older than Mr. Graham seemed to think, by no means a child, (the girl it appears was 16 years old,) that he had certainly committed no legal crime, she being a consenting party to all that occurred, and that her offence against him was greater than his against her. He seems all along to have tried mainly to shelter himself under two excuses. "It was not a legal offence, and I was not legally dismissed." He claims that the inadvertent acceptance of his resignation by the Under-Secretary, and the subsequent lax admission of his name on the roll of students-at-law, have buried all; and that the question of his moral fitness, whether the odour of the previous evil repute still clings to him, cannot be the subject of an enquiry before his admission to the roll of an honourable profession.

On the 13th December, 1888, an adjourned

enquiry was held by the Board, when the Board resolved that Mr. Costello "is morally unfit to be admitted to practise as a barrister of the said Court, and therefore, decline to examine him for his final examination." This resolution was communicated to the Judges. The resolution of the Board was also communicated to Mr. Costello on the 14th December, 1888. The long vacation then intervened until the 9th February, 1889. On the 23rd January, 1889, however, a letter from solicitors on behalf of Mr. Costello, was received by the Judges' Associates. For this singular intrusion, the solicitors were afterwards reprimanded from the bench. No solicitor has since appeared, and Mr. Costello has conducted his own case. With regard to this Court, in relation to Mr. Costello, the question of his misconduct as a public teacher, and his dismissal, were for the first time brought to the knowledge of any of the Judges, when the examiners appeared to shew cause before The Chief Justice in Chambers, on the 16th November, 1888. On the 7th February, 1889, a petition was filed by Mr. Costello, praying that the papers at his final examination in August, 1888, might be reviewed side by side with the papers of the successful candidate, or that the Board might be ordered to admit him for final examination; or in the alternative, that the said Board be ordered to pay to him £1,420 0s. 9d., &c. On the 11th February, 1889, on his return after vacation, the petition came before The Chief Justice for hearing, and he intimated that the claim for damages was absurd, and the proceeding in that respect, a mere nullity, unknown to the practice of the Court. He suggested that, if that were withdrawn, he could hear and decide the matter of the petition. Mr. Costello, who seemed very anxious to have damages from this newly found mine of gold, and proud of his proceeding as a discovery in legal procedure, persistently refused to amend his petition, and The Chief Justice then ordered the petition to be referred to the Full Court, with a preferent place in the list, among professional matters. The matter was heard on the 12th February, 1889, when the Court resolved that "no order be made on the petition at present, and that a rule *nisi* issue, calling on Mr. Costello to shew cause why he should not be struck off the roll of students; the hearing of the petition was adjourned to come on with the rule *nisi*, affidavits to be filed and served with the rule, within fourteen days, with leave (to Mr. Costello) to file affidavits in reply." The reasons for the preliminary judgment of the Court, were delivered by Mr. Justice Harding, to which we still adhere. The Board of Examiners were directed by the Court, to take the carriage of the proceedings, and the rule *nisi* was accordingly issued on the 25th February, 1889, and forms the principal matter upon which our judgment must now be delivered. In the meantime, Mr. Costello filed another petition, on the 27th February, 1889, praying the Judges, 1st—to proceed to deliver final judgment on the issue raised in the petition (of the 11th February,) 2nd—to set aside for illegality, the judgment delivered by Mr. Justice Harding, on the 12th February, and to order that The Chief Justice and Mr. Justice Harding "pay to your petitioner, the sum of £5,038, the damage he claims to have suffered by the said judgment." Mr. Costello on the 27th February, 1889, filed a similar petition, praying the Judges to order that the Board of Examiners for barristers, pay to him the sum of £5,000, which he claimed for damages. On the return of the rule *nisi* on the 5th March, 1889, Mr. Costello appeared in person, and in answer to the Judges, "declined to enter into the facts connected with his fame and character, and stated, he relied on the resolution of the Board admitting him to the roll of students." He filed no affidavits, and tendered no evidence of good fame and reputation, or of moral fitness. The Court reserved judgment on the rule *nisi*, but dismissed the petitions for damages against the Judges, and against the Board of Examiners. As to paragraph 4, in each of these petitions, in which Mr. Costello states, that at the close of his argument, The Chief Justice "asked him whether if the decision of the Court was adverse to his petition" (of the 7th February) "he would appeal to a higher Court;"

we deem it right to say, if the statement is of any consequence, that it is untrue. We are sorry to be compelled to use this very direct expression, in consequence of Mr. Costello's reiteration of his statement, notwithstanding correction by The Chief Justice. We have enquired of the Court reporter, who says, no enquiry was made, but that a not unusual utterance of the Judge that, "if we are wrong, you have your remedy," was what The Chief Justice actually said. The bearing and conduct of Mr. Costello towards the Court and Judges, throughout these proceedings, has been insolent and offensive, designed probably to stifle enquiry; but conducive, if anything could be so, to disturb the equal and impartial balance of the judicial mind. The effort to make personal service of the petition on Mr. Justice Harding at his private residence, after the delivery of the judgment of the Court, was a studied attempt to insult him, the more obvious, because no such service was attempted on The Chief Justice. We mention these things, however, merely to say that they have had no influence on our minds in any way adverse to Mr. Costello. They are follies at which we can well afford to smile and pass on. We dismissed the two petitions for damages then, on the grounds 1.—That such procedure is unknown to the practice of our Court, and is null. 2.—That they disclosed no cause of action against the Judges, or the Board of Examiners. 3.—That they did not call upon them to shew cause, nor to appear. 4.—That there had been no assessment of, or enquiry as to damages, and could be none on such procedure. 5.—That we could not make an order to pay unascertained damages. 6.—That the petitions were among Mr. Costello's misjudged efforts to overawe the Judges and examiners by a threat of personal loss in the form of damages, and so, if possible, to stifle the enquiry which they considered it was their duty, and which they had a right to make, unless he was prepared to shew his moral fitness to be admitted to the bar—a duty peculiarly incumbent upon him under our rules. As to the rule *nisi* calling upon Mr. Costello to shew cause why he should not be struck off the roll of students, we have no other means of affording him the opportunity of answering the reasonable objections and requirements of the examiners. By rules 55 and 56, and forms J. and K. appended thereto, the Board are to require before final admission, certain answers and certificates, and not the least important are these; "that he is a fit person to be admitted to practise as a barrister of the Supreme Court of Queensland," and by rule 56, "the Secretary shall refer such answers and certificates to the Board, and if the Board, *after such further enquiries as they see fit*, are of opinion that any of such answers or certificates are unsatisfactory, they shall certify the same, and the candidate shall not be permitted to present himself for examination." We think this gave the Board ample power if they thought fit, to institute the enquiry they did, not necessarily to prove the charge as a criminal offence against Mr. Costello, but to ascertain whether there was a reasonable foundation for imputing to him gross and indecent misconduct in his office of teacher, and whether, if there was, he could now be considered a person of good fame and character. But independently of the examiners, the Court has a general control over its students and officers, and over admissions to practise in the Court. The rules are not the sole source of our authority. By local statute, our barristers may now practise as solicitors, and our solicitors as barristers, and whatever authority the Court has over them, in either or both branches of the profession, whether at common law, or by statute, or rules of Court, may now be exercised over them, in either or both capacities. We have ample power under our Supreme Court Acts and Rules, but if it were needful to call in the aid of the Common law powers of the Court over its officers, who are only delegates of some of its functions, we may state our authority in the pithy language of Lord Blackburn, (then Blackburn J.) *in re Blake, gentleman*, one, &c., 30 L.J., Q.B., 32. "The jurisdiction which the Courts exercise in such cases as the present, is to ascertain whether the person accredited as an officer of the Court, is unfit to be so accredited." "The misconduct

charged in order to induce the Court summarily to interfere, need not either amount to an indictable offence, or arise out of a transaction in which the relation of attorney and client subsists between the attorney and the person against whom the misconduct is practised;" "and (quoting another case) after the Court had held that the defendant had not been guilty of an indictable offence." Lord Ellenborough, C.J., said, that "enough appeared to the Court to satisfy them that the defendant was a very improper person to remain as an attorney on the rolls of the Court," and he was accordingly struck off. *A fortiori*, if a person has obtained admission to the roll of students, who has, in a public capacity of trust, grossly abused his office, we may remove him from the roll of students, as a person not of good fame and reputation. Now shortly as to the facts—In 1877, and for some years previously, Mr. Costello had been a teacher in the public primary schools of the Colony, established by law, and administered under our Department of Public Instruction. To these schools, boys and girls of all classes in the community resort for elementary instruction. These children are mostly of tender age, and they are instructed by the master, aided by younger persons, who are called pupil teachers, and who, whilst they assist in teaching such elementary knowledge as they themselves have acquired, receive in return, further instruction from the head master; and moreover, by this kind of apprenticeship, they acquire the art of teaching, and qualify themselves for appointments as school masters or school mistresses, employed by the department. Now, Mr. Costello was one of these masters when the misconduct sufficiently described in the report of Mr. Graham, of the 22nd May, 1878, was charged against him. He admitted to Mr. Chubb, that Mr. Graham's statement was substantially correct. We need no more; Mr. Graham was in his lifetime, and Mr. Chubb is, a man of high character, incapable of a wicked falsehood for the purpose of injuring any man. Now Mr. Costello was a married man with a family, he was a trusted master of the department, a servant of the public who sent their little children to him for instruction; they trusted him too. A young girl of 16 was his pupil teacher; her parents trusted him too; she trusted him also. He had peculiar opportunities whilst giving her special instruction as pupil teacher, to seek to undermine her moral principle, and corrupt her. It does not appear that he succeeded in polluting her, but the attempt even under temptation by one who was bound to establish and not to overthrow her virtue, was a grave breach of public trust. If such conduct were to be regarded lightly, our public schools would be deserted, or become centres of moral depravity, infecting the pure life of every home, corrupting the whole body politic, by poisoning the national life at its source, and discharging their polluted pupils into life prepared for deeper descents into impurity, wickedness, and misery. No parent, no brother or sister, no citizen mindful of the public safety, could contemplate such a state of things, without fear and trembling. Most assuredly, if the minority of the examiners who resisted his admission to the roll of students, in March, 1884, had appealed to the Court, his application to be enrolled as a student, would have been refused.

In the course of his several addresses to the Court, Mr. Costello said that he could produce satisfactory evidence of good character, since his dismissal from the public service, and he invited us in scriptural language to say "go and sin no more." This is an appeal to mercy, and there are doubtless circumstances in this case which invite special consideration, and we have endeavoured to apply ourselves to it, in the spirit which we think should enter into all human judgment, a spirit of justice tempered with mercy, with allowance for ordinary human frailty, and for sincere repentance and change of life. Moreover, it is certain, where the judgment of the tribunal commends itself to the higher moral sense of the community, to its love of justice and mercy, it is most powerful for good. A golden thread of mercy should be woven in with all human judgment. We have then, this state of circumstances:—It is twelve years since Mr. Costello succumbed to temptation, and

although he has not been wise enough to produce to the Court any evidence, it may well be, that he is able to shew that his character is now re-established among his compatriots. It must be remembered too, that he has gone through years of severe mental work, and incurred expense in preparing himself for the bar, relying on his supposed security of position on the roll of students. Through the laxity of the Board of that day, he acquired that position, and, if he has since by his conduct been not unworthy of it, we must seriously consider, whether we ought not now, if he can shew these things, to permit his name to remain on the roll of students We have given grave consideration to the question, whether looking at the peculiar circumstances of this case, his former misconduct is to be a perpetual bar to him? We think, mercifully considered, it ought not; but the Court must have assurance of moral fitness now. Before admission to the bar, he must succeed in passing the final examination in both its branches. In considering the question of his good fame and character, the Board will satisfy themselves that the odour of his former transgression is no longer about him. His name, on that condition, will remain on the roll of students, and in this form the rule will be modified. We think the respondent Examiners have done their duty in the past; as to the future, Mr. Costello will have the privilege of a student, and will be entitled to present himself for examination, it being open to the examiners to hold the examination in both its branches at once, or to give precedence to either branch, as they may think fit. Mr. Costello to pay the costs of these proceedings. The Examiners have especially done their duty in guarding the public interest in the integrity and trustworthiness of the officers of the Court.

Our final judgment is:—1. As to the petition of the 7th February, to have his papers examined by collation with those of the successful candidate, and for damages against the Examiners, let the petition stand dismissed. 2. As to the petition of the 27th February, for damages against the Judges, let it stand dismissed. 3. The like order as to the petition of the 27th February, against the Examiners. 4. As to the rule *nisi*, let his name remain on the roll of students. 5. The Examiners' costs in all those matters to be paid by Mr. Costello.

Solicitors for the Board: *Wilson & Newman-Wilson.*

CIVIL COURT.

HARDING, J., April 29th, 1889.

RE THE SETTLEMENT OF A. J. MANSON, DECEASED.

Trustees—Retirement—Appointment of New Trustee—Queensland Permanent Trustee, Executor, and Agency Company, Limited, Act, ss. 10, 11, 13, 14—Cause for Retirement—Costs.

Consent of the Court given to the appointment of a new trustee, on retiring trustee paying all costs.

MOTION for change of trustees, and appointment of a Company, in accordance with the provisions of a Private Act of Parliament.

Wilson, for J. F. Buckland and W. H. Rosser, moved for the consent of the Court to the appointment of the Queensland Permanent Trustee, Executor, and Agency Company, Limited, as trustee, in place of the applicants, and that the costs of the application be ordered to come out of the estate.

Affidavits by the applicants, by the Manager of the Company, in accordance with s. 7 of the Act, and of publication of notice, as required by s. 14, were read.

Wilson: Ample powers are conferred on the Court by ss. 10, 11 and 13, to make the order. The necessity for the appointment arises by the desirability of the present trustees to retire.

HARDING, J.: There is nothing more difficult in England, than for a trustee to retire. If the order is made, I think the trustees ought to pay the costs. [The following authorities were referred to.] *Lewin on Trusts*, 8th edition, 669, 672, 846. *Anonymous*, 4 Ir. Eq., 700, where the Court refused to appoint a trustee in place of one who declined to act, and it was ruled that, a will must be filed, and the costs would be cast on the trustee, if he improperly refused to act. *Porter v. Watts*,

16 Jurist, 757. In *Hamilton v. Fry*, 2 Molloy, 458, Lord Chancellor Manners said, "In England, a trustee after he has acted, is never removed at his own desire. It is done in Ireland: but trustee must do it at his own expense. He must pay the costs of the suit." In this case, there appears to be no reason for retirement of the trustees, sufficient to entitle them under the authorities to have their costs out of the estate. It seems to be a matter of caprice.

Order consent of Court given to the appointment of the Company as trustee, in place of the applicants. Order the applicants to pay the costs of this application, and occasioned by the appointment of the new trustee.

Solicitors for applicants: *Wilson and Newman-Wilson.*

BRISBANE CRIMINAL SITTINGS.

HARDING, J. May 27-28, 1889.

REGINA v. ROCHE.

Practice—Plea — Allegation of insanity — Jury sworn to try the same — Right to begin — Insanity Act, sec. 48.

A prisoner committed for sentence from Inferior Court, allowed to withdraw plea of guilty, on his counsel alleging insanity, and on the plea of not guilty being entered a jury sworn to state whether prisoner understood proceedings of the Court.

On the finding of the jury that the prisoner did comprehend the proceedings and was sane, it was ordered that the plea of not guilty be withdrawn and that a plea of guilty be entered instead.

Held, the right to begin is with the prisoner, on whom the *onus* to prove insanity lies.

Regina v. *Davies, 3 C and Kir, 329*, not followed.

Regina v. *Turton, 6 Cox Criminal Cases, 385*, followed.

Information against *John Roche* for larceny. The prisoner was committed for sentence from the Police Court.

Wilson, for prisoner, asked to have the plea in the inferior Court withdrawn and made a statement, alleging insanity on the part of the prisoner at the time of arraignment.

Mansfield, for the Crown, submitted that unless it could be shown that the prisoner was insane at the Police Court, when he made his plea of guilty, it would be of no avail.

Wilson: If it is shown that a prisoner is of unsound mind, all proceedings can be stayed at any time.

HARDING, J.: Well, then, he goes to prison for ever?

Wilson: No, he is confined during the Queen's pleasure.

Mansfield then tendered the depositions, and the plea of guilty entered in the Police Court.

Wilson: The difficulty in this matter arises out of the fact that such cases are not provided for in the new Act. If at any time it comes to the cognizance of the Court, that the prisoner is insane, all proceedings must be stayed.

HARDING, J.: It will be for the jury to say whether he was insane at the Police Court, and whether he is insane now.

Wilson: Such a proceeding is not provided for in *The Insanity Act of 1884*, which repealed the old Act of George III, and it is a question now, whether a jury can be summoned to try the question. The difficulty arises in this case from the committal of the prisoner for sentence.

HARDING, J.: There is no difficulty about that. I cause the prisoner to be re-arraigned. The man has pleaded guilty, which is simple enough, and you assure me that you have evidence of the man's insanity.

Wilson: And I submit that the proceedings must be stayed.

HARDING, J.: The proper course will be for Mr. Wilson to ask for the prisoner's plea to be withdrawn. If I accede to that, I will have a jury empanelled to try the question, whether or not the prisoner can understand the proceedings and plead to the information. This is the course I took at Maryborough, in *Regina* v. *Jansen*, about 1880, before the new *Insanity Act* came into force, and I do not see how that Act affects what I did on that occasion. The only difference is, that the old *Insanity Act* was in force then, and the present Act operates now. The real question is whether the prisoner is in a state of mind to understand what we are doing. If he is not, we must wait till he is, subject to Her Majesty's pleasure.

Wilson then asked that the prisoner's plea of guilty should be withdrawn, and on the concurrence of the Crown, the request was acceded to. The prisoner was then remanded till the next day, in order to allow the Crown to inquire into his mental condition. On the following day the prisoner was arraigned and pleaded not guilty. A jury was then empanelled, the following oath (*Archbold, 19th edition, p. 153*) being administered:

You shall well and truly try whether *John Roche*, the prisoner at the Bar, who stands charged with felony was able, competent, and of sufficient intellect to understand and comprehend the proceedings on the trial when he pleaded to the information after referred to, and whether he is now able, competent, and of sufficient intellect to understand and comprehend the proceedings on the trial to be now had and taken on the information preferred against him for the said felony, and upon which he hath been now arraigned and pleaded not guilty, so as to make a proper defence thereto. So help you God.

And the following oath was administered to the witnesses:—

The evidence which you shall give to the Court and jury upon this inquiry, shall be the truth, the whole truth, and nothing but the truth. So help you God.

The usual proclamation as to witnesses, except one medical witness on each side, was then made.

HARDING, J. then called on *Wilson* to begin.

Wilson: I have no objection to begin, but there is a different practice that was followed in *Regina* v. *Davies*. 3 C. & Kir., 329.

HARDING, J.: That case has not been followed. *1 Russell on Crimes, 135-6. Regina* v. *Turton, 6 Cox C.C., 385.* A man is presumed to be sane until the contrary is proved, and the burden of proof falls on the prisoner now, though it may shift as the case goes on.

Wilson, in opening, referred to *1 Russell on Crimes 114*; *Regina* v. *Oxford*, 9 C. & P., 546; and as to admissions or statements, *Regina* v. *Pearce*, 9 C. & P., 670. Medical and other evidence was then called, and counsel addressed the jury.

The jury found that the prisoner was able to comprehend the proceedings on the trial when he pleaded to the information, and (2) that he was now capable of understanding the proceedings.

Mansfield thereupon applied that the plea of not guilty be struck out, and the plea of guilty entered.

HARDING, J.: Be it so.

Mansfield prays judgment.

Wilson did not desire to press the question of sanity any further, but asked for mercy on the ground of previous good character. The prisoner was then sentenced.

Solicitors for prisoner: *Chambers, Bruce, and McNab.*

Solicitor for Crown: *J. Howard Gill.*

ante p. 99

MAY SITTINGS OF THE FULL COURT.

In the matter of JAMES WHITWORTH ANDERSON, A SOLICITOR OF THE SUPREME COURT OF NEW SOUTH WALES.

Admission of Solicitor of Supreme Court of New South Wales—Reciprocity between Courts—Reg. Gen. of 12th December, 1879, r. 15.

Solicitors of the Courts of other colonies are admissible under reciprocity only. The rule of reciprocity is strict, and this Court cannot observe it alone. Upon the Supreme Court of another colony, which has hitherto admitted the solicitors of this Court, refusing to admit them in future, this Court will refuse to admit their solicitors.

Rutledge moved the conditional admission of Mr. James Whitworth Anderson, a solicitor of the Supreme Court of New South Wales.

LILLEY, C. J.: As between this colony and New South Wales, he cannot be admitted here That door is closed. I saw The Chief Justice of New South Wales, when I was in Sydney last time, and he told me that they would not admit our solicitors there in future; so this Court is closed against their solicitors. The rule is simply one of reciprocity; the New South Wales Supreme Court, in consequence of a recent decision of this Court, has intimated to me, through their Chief Justice, that in future our solicitors cannot be admitted there. We, of course, cannot submit to criticism of that kind on the part of the New South Wales Supreme Court, and continue to accord their solicitors a privilege which they refuse our own.

ience, as there ceases to be reciprocity . we will not grant admission to their he rule of reciprocity is strict, and it alone. I very much regret that I have taken such a stand as this, I seems to have been wholly use, not only to our solicitors Courts, but to a number of ing men a privilege which is very the advantage of admission into our courts. y will have that advantage of reciprocity when their Court alters the rule back again. Some years ago we, for five years, granted admission to the barristers of the Supreme Court of New South Wales, in the hope that that Court would reciprocate. They never did, and it was only when compelled by their Legislature, that they granted reciprocity to the professional men of the bar of this Colony. The whole matter of admission will probably have to form the subject of discussion between the judges of the several Colonies. At present we must hold to our opinion. Mr. Anderson's admission is refused.

HARDING, J.: In this matter it seems to me that the Supreme Court of New South Wales, to a certain extent, have arrogated to themselves the functions of a Court of Appeal. We thoroughly investigated a certain case, and decided upon it; and that Court took upon themselves, as I said, to a certain extent the functions of an Appeal Court, reviewing our decision. I entirely sympathise with the course we are now taking. In doing this, I would record that no imputation of any kind is cast upon the applicant.

LILLEY, C. J.: Of course not; he has not, now, the requisite status to entitle him to admission here.

Admission refused.

HODEL *v.* CRUCKSHANK.

Divisional Boards Act of 1887 (*51 Vict., No. 7,*) *secs. 16 and 26—The Impounding Act of 1863* (*27 Vict., No. 23*)—*Constitution Act* (31 *Vict., No.* 38), *sec. 14—Office of profit under the Crown—Poundkeeper.*

The office of poundkeeper under the *Impounding Act*, is an office of profit under the Crown, and such poundkeeper is therefore disqualified from holding the office of member of a Divisional Board, under the *Divisional Boards Act of 1887.*

1923 ARQ Jan 15

MOTION to make absolute a rule *nisi*, granted by His Honor The Chief Justice, in Chambers, on 27th March last, calling upon respondent to show cause why a judgment of *ouster*, under sec. 26 of the *Divisional Boards Act of 1887*, should not be entered against him, with costs.

Real, *Lilley* with him, appeared for the relator to move the rule absolute; and *Sir S. W. Griffith*, *Q.C.*, *Feez* with him, for the defendant, to oppose.

Real: There is no dispute as to facts. Both parties were candidates for election as members of the Thuringoma Divisional Board. Respondent was elected, and took his seat. He was local poundkeeper, and notice of objection on that ground was given him by a candidate named Hole, who withdrew before the polling day. This was clearly an office of profit, and was under the Crown, and Cruckshank should be ousted: *Divisional Boards Act of 1887*, ss. 16 & 26. The *Impounding Act*, ss. 2, 6, 7 8, 11, 13, 25, 29, 30, & 31. Cited *Badkin* v. *Powell*, Cowp. 476, referred to in the case of *Grandling* v. *Kent*; 1 T.R. 62, 3, *Stephen Comm.* p. 350, 4th ed. A poundkeeper was appointed by the justices, and the notification of his appointment was signed by the police magistrate or the C.P.S. The question was, had the Crown deputed to the justices, as most likely to know whether he was fit or not for the office, the duty of appointment, retaining to themselves the right to receive moneys and revise his accounts. All the poundkeeper's duties were regulated by statutes. He had to give a bond to the Crown for the proper performance of his duties, and he had to account to the Crown for the fees levied by him. If he failed in that performance the Crown were responsible, and there was a penalty on them, fixed by statute. He was a minor officer under s. 14 of the *Constitution Act.*

Griffith: The term office of profit under the Crown was an old phrase, well understood in relation to parliamentary law, and had been recently

imported into the *Divisional Boards Act*. There was direct authority given to the justices by statute to appoint him. He was a public officer, not under the Crown, and he was not paid a shilling by the Crown. The strongest argument against respondent was that he had to give a bond to the Crown, but that did not make him a Crown officer. He would be disqualified from sitting in parliament, if he were a contractor with the Crown; but under the *Divisional Boards Act*, he might sit while contracting with the Crown, though not with the Board. The justices appointed the poundkeeper, and might remove him for misconduct. Referred to *Thomson* v. *Pearce*, 1 B. & Bing.; *Constitution Act*, sec. 14.

Real, in reply, referred to the *Small Debts' Act*, sec. 7, and the *Constitution Act*, sec. 14.

C.A.V.

LILLEY, C.J., delivered the judgment of the Court, as follows:—The question in this matter is whether the respondent, Cruckshank, is the holder of an office of profit under the Crown. If he is, the rule must be made absolute, because he is one of the persons disabled from holding office as a Divisional boardsman, under the *Local Government Act of 1887* The answer to the question, whether he is a holder of an office of profit, depends on the construction of the *Impounding Act*, taken in connection with the 14th section of the *Constitution Act*. Now, the Justices of the Peace are themselves officers of the Crown; they hold office under the Crown, but do not hold office of profit; and into their hands has been committed, by the *Impounding Act*, the duty of appointing the keeper of a pound. Cruckshank, the respondent, was holder of what is admitted to be an office of profit; that is, he was keeper of a pound, for which he received fees. Therefore, it is admitted that he was the holder of an office of profit. The question is whether he was holder of that under the Crown, or was he merely appointed by the Justices of the Peace. Now, section 6 of the *Impounding Act of 1863*, gives the justices power, in a special court of petty sessions, to appoint a poundkeeper; he is not appointed for longer than twelve months, and under section 5, the justices have power to remove him, if guilty of any offence or neglect under the Act. When appointed, he has power to receive cattle impounded, and to receive fees. He has to give to the Crown a bond for the proper performance of his duty, "conditioned that he shall well and truly perform the duties of such poundkeeper, and account for, and pay over all fees or moneys received by him in such capacity to such persons and in such manner as is by this Act directed." Then there are provisions in the Act, regulating the disposal of fees which he is entitled to receive, and disposing of certain of them for the benefit of hospitals. He is to account to the Clerk of Petty Sessions, in the first instance, and the clerk is to send his account to the Treasurer of the Colony, who is the check on the poundkeeper. Portion of the fees go into the revenue, as we see, for the support of local hospitals. Well, on what tenure does he hold his office? Under section 14 of the *Constitution Act*, certain persons may have the right of appointment to offices—minor appointments under the Crown. The justices then have here the power to appoint, and the power to remove for neglect or misconduct, but there, all authority over the poundkeeper by the justices seems to cease. Under a subsequent statute, from and after the passing of the Act, 43 Vic., No. 2, called the *Impounding Act Amendment Act of 1879*, it is enacted in section 2, that all inspectors of brands shall be inspectors of pounds, with power to inspect all stock impounded, and all books or other documents kept by any poundkeeper. So that the justices are limited merely to the appointment, and removal under particular circumstances. Now, a pound is a public pound; it is established, and may be abolished by the act of the Executive Council. The poundkeeper is accountable to the Crown for fees received; he must give a bond to the Crown for the proper discharge of the duties of his office. He is placed under the inspection of an officer of the Crown, called the Inspector of Brands, and his appointment and removal depend on the judgment of other officers of the Crown, who are the

Justices of the Peace. It seems to us, that, looking at all these circumstances, and at the Act, that he must be a minor officer of the Crown, whose appointment was made by the Justices of the Peace, by force of the *Impounding Acts*, and whose appointment under these circumstances brings him within the law, as a minor officer. That being so, firstly, he is holding an office of profit, and secondly, he is holding that office of profit under the Crown. Under these circumstances we think that he is disqualified from holding the office of member of a Divisional Board, because he is a person holding an office of profit under the Crown The rule will therefore be made absolute.

Solicitors for relator: *Chambers, Bruce and McNab*, agents for *Edwin Norris & Son*, of Townsville.

Solicitors for defendant: *Roberts & Roberts*, agents for *Roberts & Lee*, of Townsville.

JUNE SITTINGS OF THE FULL COURT.

REG. *v.* RODY HOGAN.

Dying Declaration—Authenticity of, without declarant's signature — Absence of prisoner while declaration was being made.

A dying declaration is admissible if its terms can be proved by a witness who was present when it was made, and such declaration does not require to be signed or authenticated in any other way.

SPECIAL case stated by Mr. Justice Cooper:—

Judge's Chambers,
Supreme Court, Bowen,
May 23rd, 1889.

REG. *v.* RODY HOGAN.

The above-named prisoner was tried before me at Townsville, on the 2nd and 3rd of May instant, on the charge of having murdered a man named William Guilfoyle. A material part of the evidence against Hogan, was Guilfoyle's dying declaration, which had been taken down in writing by Mr. Zillman, the Police Magistrate of Herberton. It began with the words, "I, William Guilfoyle, believing that I am in danger of impending death, and that I have no hope of recovery, do solemnly and sincerely declare," and proceeded to relate the circumstances of the crime. At the end were inscribed these words and figures, "Declared before me this fourth day of November, 1888, at Herberton, A. H. Zillman, Police Magistrate." The document was not signed or otherwise marked in any way by the declarant.

William David Bowkett, a duly qualified medical practitioner of Herberton, was examined, and in the course of his evidence said, "I was present on the 4th November, when Guilfoyle made a dying declaration. Mr. Zillman, Police Magistrate, and Mr. Ringrose, barrister, were there at the time, and, for a portion of the time, Constable Lanigan and prisoner. The declaration was taken down in writing. It was read over to Guilfoyle. While Guilfoyle was making his declaration the prisoner was brought into Guilfoyle's presence, and Guilfoyle was asked whether that was the man, or whether that was Rody Hogan (I can't remember which), and he said 'Yes.' Guilfoyle was suffering a good deal of pain. His mind was clear." The witness then looked at a document and said, "This is the declaration."

Mr. Macnaughton, of the bar, who defended the prisoner, objected to its reception, on the ground that the prisoner was not present all the time.

I overruled the objection.

The witness continued, "I had no hope of Guilfoyle's recovery and I told him so."

The document was then tendered; no further objection was taken; it was admitted and read. No further evidence was given upon the point under consideration.

After the jury had retired, Mr. Macnaughton asked me to reserve a case for the consideration of the Full Court, on the ground that the declaration made by Guilfoyle, was not signed or authenticated on the face of it by him, and was consequently not receivable in evidence, and ought not to have been left to the jury. He cited *Regina* v. *Gibson*, 18 Q.B.D., 537.

The jury convicted the prisoner, and I passed sentence of death upon him. I respited the execution of the sentence until after the decision of the Full Court upon the point reserved should be known.

POPE A. COOPER.

Power, for the Crown, submitted that the objection should be overruled. This case was similar to *King* v. *Reason & Nantes*, 1 Str., 499.

LILLEY, C.J.: I see now why *Reg.* v. *Gibson* is mentioned here. Under that case, now, the prisoner's counsel may wish to have certain evidence in for the sake of his client, and afterwards should it turn out to be inimical, the judge would have to reject it, because it should not have been admitted. I very much regret that that decision has been given. We are bound by it; and under it we must now treat this matter, as if counsel had been present and had objected. A prisoner now only needs the luck to get a bit of evidence in, that the judge should not have allowed in against him, even if elicited by his own counsel, and he is as if it

had been objected to by counsel and put to the jury.

The document here was not a deposition; we can only treat it as a dying declaration. It had to be proved by someone who heard it taken. Here the doctor does that. There is nothing in the point that the prisoner was not present; nor in the point that it was not signed by the declarant. The terms of the declaration are clearly proved by the witness, who says he was present. There is nothing here, as far as I can see, that might not have been admitted. As the terms of the declaration were proved by a witness present when it was made, I think it was clearly admissible, and need not have been signed, or authenticated in any other way. The man may not have been in such a condition as to have borne to have his deposition taken. These things are usually done in a hurry. Had it been possible, the prisoner being there, it would have been better to have taken a deposition. The conviction must be affirmed.

Solicitor for Crown: *Gill*, Crown Solicitor, for *Petrie*, Crown Solicitor, Bowen.

REGINA *v.* YALDYWN AND OTHERS.

Local Option Poll—Licensing Act of 1885 (49 Vict., No. 18)—Resolution for reduction of number of licensed houses—Certiorari.

A poll, in favour of a resolution to reduce the number of licensed houses in I., to ten, was taken under sec. 115 ~~113~~ of the *Licensing Act*, and notice of such resolution was sent to the chairman of the Licensing Bench, in accordance with sec. 120. On the objection, that notices had not, as required by secs. 116 and 120, been posted at doors of all school houses, post offices, and railway stations within the area, the Bench refused to act upon the resolution, and to reduce the number of houses to ten, but granted certificates for licenses to all the applicants, numbering thirteen.

Held, that the notice to the chairman by the returning officer, was sufficient notice to constrain the Licensing Bench from granting more than the number of licenses limited by the resolution. That notice was imperative upon the Justices; and the posting of notices within the area, was matter subsequent to the passing of the resolution, and did not affect its validity. The Justices had no power to question the validity of the poll.

Held, also, that in such a case, *certiorari* was the proper remedy; but not *quo warranto*. Order made for *certiorari*, *mandamus* and prohibition to issue.

MOTION to make absolute a rule *nisi* granted by The Chief Justice in Chambers, on 12th April, calling upon Wm. Yaldwyn, Police Magistrate, Ipswich, E. A. Bullmore, George Thorn, Robert Thallon, C. C. Cameron, and C. Gorry, JJ.P., members of the licensing authority of Ipswich, and upon Wm. Grace, M. Kelly, W. Thorpe, A. M. Fairley, G. Oldham, P. Donegan, Jane Bedford, C. Baldrey, G. Shaw, C. Nolan, S. H. Swift, D. Kennedy, and W. Haigh, applicants for certificates for licenses, as licensed victuallers at Ipswich, within the area dealt with by a poll taken under the local option clauses of the *Licensing Act*, to shew cause, 1st, why a writ of *certiorari* should not issue to bring up the record and proceedings of the sittings of the licensing authority, held at Ipswich on 3rd April, 1889, and the certificates issued or to be issued to the said applicants; 2nd, why a writ of *mandamus* should not issue to the justices to enter adjournments and to deal with the applicants, and reduce the number of certificates to the said applicants; 3rd, why a writ of prohibition should not issue to restrain the parties from proceeding on the said certificates; and 4th, why an information in the nature of a *quo warranto* should not issue to the said applicants to shew by what authority they held their certificates for licenses.

This rule was obtained on the application of *Lilley*, for T. B. Cribb, a ratepayer and voter at the local option poll, the relator and prosecutor; and was made returnable before the Full Court, sitting on 7th May, 1889.

The circumstances as set out, were, that a poll of ratepayers within the area concerned, had been duly taken at Ipswich, on 25th September, 1888.

The poll was in favour of a resolution, under sect. 115, par. 2, and sect. 123 of the *Licensing Act of 1885*, that the number of hotels in the area should be reduced to ten. The returning officer sent a notice to the police magistrate, as the chairman of the licensing authority, of such resolution having been passed. When the matter came before the sitting justices composing the licensing

authority, objections were taken by counsel for the applicants, to their jurisdiction: first, that notice of the result of the poll had not been sent to each member of the licensing authority, and second, that notice of the result of the poll had not been posted at the doors of all public school-houses, post offices, and railway stations in the district. The justices rejected the notice of the poll, and of the resolution being passed, on the ground that notice had not been posted up in accordance with ss. 116 and 120 of the statute. Application was made on behalf of one of the applicants, that the justices should number the certificates in the order in which they granted them. The justices declined to do so.

Sir S. W. Griffith, Q.C., Lilley with him, appeared on behalf of the relator and prosecutor, Cribb; and *Real, Wilson* with him, to shew cause for the holders of certificates for licenses.

Griffith stated the circumstances of the case; and contended that the posting of the notices on the different public buildings did not affect the jurisdiction of the licensing authority. The justices had notice by their chairman, and were bound to obey the resolution.

Real opposed, and cited *Reg.* v. *Paterson, Expte. Woof*, 10 Austr. L.T. 155; *Reg.* v. *Oliver*, 10 Austr. L.T. 158; *Colonial Bank* v. *Wilhelm*, 5 P.C., 417 at 443.

Wilson followed.

Griffith, in reply, cited *Reg.* v. *Shepley*, L.R., 22 Q.B.D., 96; and Harding's *Crown Office Rules*, O. 7, r. 10, at p. 8; and applied for costs of application.

Real opposed the application for costs. It was a case of first impression under a new statute; and ten of the applicants for licenses would eventually be not to blame. The solicitor for one of those parties had asked the justices to number the certificates, and it had not been done.

C.A.V.

LILLEY, C.J., delivered the judgment of the Court, as follows:—

This is a motion for a rule absolute, calling upon certain justices and holders of certificates or publicans' licenses, to shew cause why a writ of *certiorari* should not be directed to them to bring up the record and all proceedings relating to the sittings of the Licensing Bench for the District of Ipswich, constituted under the *Licensing Act of 1885*, held at Ipswich, on the 3rd of April, 1889, and the certificates issued under the provisions of the said Act to the several publicans; and further, to shew cause why a writ of prohibition should not issue to prohibit the said parties from further proceeding upon, and in respect of certain judgments or orders made by them on the applications of the said publicans for the issue of certificates for licensed victuallers' licenses; and further to shew cause why a writ of *mandamus* should not issue to the said justices, commanding them to enter adjournments of the hearings of these applications for certificates, and to reduce the number of the said certificates to ten; and there is further a requisition on the said publicans to shew cause why an information in the nature of a *quo warranto* should not be filed, calling upon them to shew by what authority they claim the status, liberty and privilege of holders of certificates for such licenses within the licensing district of Ipswich. As to that, we think there ought to be no order of *quo warranto*.

We will deal with the other portions of the rule. In this case, a poll had been taken in the district, or within a certain area, under the local option provisions of the *Licensing Act*, and a resolution was voted for by the ratepayers, under sec. 115. The resolution carried—the second under the section—was "that the number of licenses shall be reduced to a certain number, specified in the notice, not being less than two-thirds of the existing number." In this case the licenses were to be reduced to ten. The returning officer, upon the poll having been taken, and the vote recorded to that effect, sent notice, under sec. 120, to the licensing authority. The statute, sec. 120, last paragraph, enacts

> When any of the resolutions has been adopted, information thereof shall be sent by the returning officer within seven days to the minister, and to the licensing authority, having jurisdiction within the area.

The licensing authority is the justices charged with the duty of dealing with the applications for licenses. That being done, a Court was held to consider the applications for licenses, and the applicants were represented by Mr. Wilson, and other professional gentlemen. Objections were taken, and one or two overruled, which are of no importance now. But the objection was made under section 120, that there had been an omission to give notice of the result of the poll, that is, of the adoption of the resolution, in the manner prescribed by the statute. The enactment of the first subdivision of sec. 120, is, that

> The returning officer shall, as soon as possible after the poll, declare the result of the voting. He shall, further, if any resolution has been adopted, give notice of its adoption, in the same manner as hereinbefore provided for giving notice of a poll under this part of this Act. Such notice shall be conclusive proof, in any proceedings under this Act, that the resolution has been duly adopted.

The provision as to notice referred to is contained in sec. 116, which requires that notice shall be "affixed on or near the door of every public school, post office, and railway station in the area." The objection was that that had not been done, and the magistrates held that, there being no proof of that, their hands were not stayed by the notice, which they had undoubtedly received from the returning officer; and instead of proceeding to reduce the number of licenses, as required by the resolution of the ratepayers, they granted the full number. Instead of reducing them to ten, they granted thirteen. By sec. 123,

> If the second resolution is adopted, it shall be the duty of the licensing authority at their next general meeting for granting and renewing licenses and certificates,

which was this particular occasion—

> and at all future meetings as long as the resolution is in force, to restrict the total number of licenses and certificates granted or renewed by them to or within the number specified in the resolution, and for this purpose, each certificate shall be numbered by the licensing authority, according to the order in which it is granted.

I have said that they proceeded to grant the full number; in effect, they did not observe their duty under the provisions of the statute. They did not reduce the number of licenses, but granted the whole thirteen applications.

The objection made, to which they gave effect, was that there should be proof of the passing of the resolution on this particular occasion; that, in order to constrain the magistrates, there should have been proof that notice of this resolution had been posted on all public schools, post offices, and railway stations in the area; that magistrates were at liberty to require proof of that; and that they were at liberty, if such proof were not given, to disregard the poll. The magistrates required that it should be proved that notice had been given; there was no evidence either way before them. We intimated our view of the statute on that particular point at our last sitting: we think there was sufficient evidence before the magistrates, for the purpose of the Court on that day, of the passing of the second resolution, because they had before them the notice which the statute requires the returning officer to send them. The proof of the posting of the notice of adoption of this resolution, on all public schools, post offices, and railway stations, is matter subsequent to the passing of the resolution, and in no way affects its validity under the statute. That section does not exclude other evidence, or the imperative operation of the notice on the magistrates. The magistrates must not disregard the resolution, after service on them of a notice by the returning officer.

That being so, the magistrates, in sitting as a licensing court, exercise by force of the *Licensing Act*, judicial functions. It is a tribunal subject to the controlling authority of this Court, and, if it disregards its jurisdiction,—either acts in a matter where it has no jurisdiction, or in excess of the jurisdiction conferred on it by law,—we have authority to constrain them to act within the lines marked out by law for them.

The question now is, what is really the proper remedy here? They clearly, in disobeying the statute, have rendered themselves liable to the order of this Court. The effect of a resolution of this kind is to limit or restrict their jurisdiction under the *Licensing Act*. When they had notice of this resolution that they should reduce the number of licenses in the area, it was their duty

to obey the notice, not to object to or question it. It was a judicial tribunal, and this was a judicial act, declared to be so by this statute, and we think that in this case *certiorari* will lie, and that it is the proper remedy to bring up, not this notice, but the certificates. Then first, the order will be to bring up the orders which the magistrates made for the issue of the certificates, and then, the certificates; and that, upon their being brought up, they be quashed by force of the rule, without further order. Then we also order that the *mandamus* issue commanding the justices to enter adjournments, and to adjudicate on the several applications, and to number the certificates; and further, that a prohibition should issue to restrain the parties enumerated in the rule, that is, the justices and the holders of certificates, from further proceeding.

I think the magistrates have no power to go into the question of the validity of the poll; that must be questioned here.

As to costs, the respondents, except the justices, are to pay the costs of these proceedings.

Solicitors for relator and prosecutor: *Foxton & Cardew.*

Solicitors for respondent licensees: *Lilley & O'Sullivan.*

LILLEY, C.J., 15th July, 1889.

SHANAHAN *v.* TARANGANBA PROPRIETARY GOLD MINING COMPANY, LIMITED.

Master and Servant—Breach of Statutory Duty by both—Mines Regulation Act of 1881 (45 Vic., No. 6), General Rules, secs. 6, 11, 14 and 17.

Plaintiff was employed by defendants in mining in their gold mine, and was provided by them, in contravention of sec. 6 of the *Mines Regulation Act*, with an iron tamping rod. Though he knew it to be dangerous to use an iron rod, he continued to use it, and was blown up by an explosion, while ramming a charge of powder. By sec. 14, every person employed in a mine, is directed to cease using any appliances which he finds to be unsafe, otherwise, by sec. 17, he is guilty of an offence under the Act.

Held, that plaintiff was guilty of a breach of the statutory duty equally with the defendants, and that he was an offender against the statute. His injury being consequent upon his own disobedience of the law, he could not compensate himself for his own injury by recovering damages from his employers, the defendants. *Baddeley* v. *Earl Granville*, L.R., 19 Q.B.D., 423, distinguished.

ACTION for £1000 damages, for injuries received while in employment of the defendants and through their negligence.

Plaintiff, a labourer in defendants' employ, was engaged on the 24th July, 1888, ramming a charge of blasting powder in a bore-hole in rock, on defendants' gold mining property, near Rockhampton. He was using an iron tamping rod which the defendants had supplied him and ordered him to use, in contravention of the *Mining Act of 1881*, s. 6, sub-sec. ii., para. *e*. The charge exploded, and plaintiff was injured thereby, and laid up and put to loss and expense in consequence.

The defendants' case was that there was contributory negligence on the part of the plaintiff, or of another of their servants; and that the plaintiff had voluntarily continued to use the iron tamping rod, notwithstanding that he knew there was danger.

The action was heard at the Maryborough Circuit Court, on 6th May, 1889, before His Honor The Chief Justice, and a jury of four. The evidence then given is fully set out in His Honor's judgment below. The jury found that the plaintiff was mining for the defendants; that they had negligently and carelessly supplied him with an iron tamping rod, and had ordered him to use it; that he had not used it against their orders; and that he was injured in consequence. They further proved that the defendants had not supplied wood or copper tamping rods to the plaintiff; that the explosion was not caused by another servant's negligence; and he could not have avoided it by using ordinary care. They found in reply to the 13th question,—"Did the plaintiff know the danger, and with such knowledge, voluntarily continue to use the iron tamping rod?"—that he did know; "but that he did not fully realise the extent of the danger." They found £93 damages.

Lilley, who appeared on behalf of the defendants, on the close of the plaintiff's case, moved for a nonsuit, on ground *volenti non fit injuria.*

LILLEY, C.J., declined to nonsuit.

Real, for the plaintiff, moved for judgment for £93, on the findings of the jury.

Lilley moved for judgment for the defendants.

LILLEY, C.J., gave leave to both parties to move for judgment before him at Brisbane.

On 31st May, 1889, the matter came on on motion.

Real appeared on behalf of the plaintiff, and *Lilley* for defendants.

Real moved for judgment. A mere illegal act will not deprive a man of the right to recover. The question here was, did plaintiff realise the actual danger with respect to that particular blasting charge? Plaintiff was entitled to judgment at common law, on the jury's answer to question 13, and under the statute. He cited *Priestley* v. *Fowler*, 3 M. & W.; *Laurence* v. *Count Bismarck G. M. Co.*, 4 Vic. L.R., Law, 83; *Clayards* v. *Dethick*, 12 Q.B., 439; *Lax* v. *Mayor of Darlington*, L.R., 5 Exch. D., 28. As to illegality under statute, he cited *Blithe* v. *Topham*, Cro. James, 158; and Mass., 169, quoted in *Smith on Negligence*, 2nd Ed., p. 235; secs. 11, 14, and 17, *Mines Regulation Act, 1881*. The employer was liable.

Lilley: The illegality of plaintiff's actions under the Act destroyed his case. He had entered fully into the risk; and the maxim *volenti non fit injuria* ruled the case. At common law he was not entitled to recover. *Ballantyne's* and *Collinge's* cases were not analogous; there the men did not know the danger. Referred to *Baddeley's* case, and to *Thomas* v. *Quartermaine*, L.R., 17 Q.B.D., 414, and 18 Q.B.D., 685; Ld. Esher's and L.J. Bowen's judgments; also to *Caswell* v. *Worth*, 5 E. & B., 849, and 25 L.J., Q.B., 121; *Britton* v. *G. W. Cotton Co.*, L.R., 7 Exch., 130, cited in *Smith on Negligence*, 2nd Ed., p. 144. Neither the English *Coal Mines Regulation Act*, 35 and 36 Vic., c. 76, s. 52, under which *Baddeley's* case came, nor the Victorian *Mining Statute of 1873*, under which *Laurence's* case was decided, contained a section similar to s. 14 of our statute. Plaintiff's own illegal act, under the statute, brought about the accident. He could not take advantage of his own wrong doing; as a law breaker he could not recover under the statute.

Real: *Baddeley's* case was on breach of rules; the plaintiff knew of rules and of their breach. Sec. 52 of the English Act, provided for special rules, and sec. 17 of our Act, seemed to have been taken from that, in great measure. The explosion would not have happened, if defendants had not negligently supplied the iron tool. Contributory negligence was a different thing from knowledge by the plaintiff.

C.A.V.

LILLEY, C.J., on the 15th July, delivered the following judgment:—

The plaintiff, a working miner, sues the defendant company for damages, for injuries sustained by him, whilst employed by the Company in mining on their property at Tarenganba. He alleges that they negligently supplied him with a tamping rod of iron, whereas it was their duty to have supplied him with one of copper or wood; that in so doing, they acted in contravention of the mining regulations; that the iron rod was dangerous, and that, whilst using it, the charge of powder exploded, and the plaintiff was injured. The case was tried before me at Maryborough, and the defence resolved itself eventually into the questions; 1, whether the plaintiff knew the danger, and, with that knowledge, voluntarily continued to use the iron tamping rod; 2, whether the maxim *volenti non fit injuria* must be applied in deciding the case, and the plaintiff be held to have taken the risk himself, so as to deprive him of the right to recover damages against his masters; and, 3, whether the injury having been caused by a breach of statutory duty on the part of the plaintiff, he could recover damages from his masters? I reserved full powers of amendment for both parties to meet the case actually tried. The plaintiff in his evidence said, "I knew the iron rod was a dangerous thing to use. I knew there was a danger that at any moment I might be blown up using an iron tamping rod. I knew the mining regulation that a wooden

or copper one should be used. I knew that the powder mixed with stone was a dangerous thing, and that using an iron tamping rod made it more dangerous still." In other portions of his evidence he said, "an iron tamping rod was supplied to us. After we got the hole down, Lynch asked us to charge it with powder. The blacksmith's striker brought down an iron tamping rod—I took it down to Lynch (the mining manager or overseer) who was away about ten yards from us. I said to him it was a dangerous bar. I never heard of nothing, only copper or wood. Lynch told me to make a make-shift till he got some copper from Rockhampton. I told Lynch several times he ought to get copper." No accident occurred for five weeks. Before the accident the plaintiff was called with Davis, his mate, to load a hole which had been drilled by two other men. They went. Plaintiff thus describes the accident; if the word can be reasonably applied to the conduct of those concerned in the work. "The hole was five feet deep. Lynch called us. There was an iron tamping rod there then. I was boring a hole when called away. Davis went and got the tamping rod and powder from Lynch, and I dried the hole out. Lynch gave powder to Davis to put in the bottom of the hole; it was powder that had spilled, and was gathered up again with stones in it. I was going to chuck it away. Lynch said I was to put it in the hole. I put it in the bottom of the hole and put 2 ft. 6 more powder on the top of it. Tamping is pressing the powder down. I was doing the tamping and Davis was putting in the powder. We had about 2 ft 6 in. in when the explosion took place. We were just going to put in the tamping clay. Davis had just gone to get this clay when the powder went off. The shot exploded. I was blown into the air; Davis was blown under a dray. Lynch, I think, was on the bank when the explosion took place. My hands were torn," &c., &c. Davis says, "I went away to get some dry tamping; when I came back I saw Shanahan and Lynch talking over a dipper containing powder and stone. Lynch wanted Shanahan to put it in the hole. I said to Shanahan, 'chuck it away—throw it away.' Lynch said, 'put it in the hole; I'm boss.' It was put in the hole, &c. Shanahan put the bar to tamp it, and that is the last I knew," (he was blown up and injured.) He continues, "I had spoken to Lynch about the bar on two or three occasions; I told him it wasn't fit for us to use, and there'd be somebody shot over it. He said, I had to make shift with it. I saw Lynch on the bank just before we were blown up. I spoke to Shanahan about using that iron bar, told him it was dangerous, against the rule." Other miners were called and they testify the same thing. It was known on the mine, and it is known amongst miners, that it is dangerous to use an iron tamping rod. By our *Mines Regulation Act*, 45 Vict., No. 6, sec. 6, "General Rules," subsection (*e*,) it is enacted that, "no iron tool shall be used in tamping or ramming." By sec. 8 it is required that "the general rules shall be posted in the office, (if any) and on a building or board, in some conspicuous place in connection with every mine." The defendants omitted primary duties under the Act; they did not supply a wooden or copper tamping rod, and they did not post the regulations in the office, or anywhere on the mine. The defendants, moreover, contravened the Act by supplying a rod of iron, which is prohibited. I put the following (amongst other questions) to the jury. "13. Did the plaintiff know the danger, and with such knowledge, voluntarily continue to use the iron tamping rod?" They answered, "Yes, but he did not fully realise the extent of the danger." Does the maxim *volenti non fit injuria*, then, apply to this finding? In *Collinge* v. *Pettigrew*, and *Ballantyne* v. *Peters*, I laid it down and directed the juries, that the plaintiff must *fully* understand the risk, before he can be held to have incurred it willingly. The finding of the jury in this instance means that the plaintiff was willing, so far as he understood the risk, but that he did not fully realise the hazard. The questions, whether the plaintiff fully understood and willingly undertook the risk, were for the jury. The plaintiff could not be said to be *volens* in undertaking a hazard which

he did not fully realise. The finding seems, therefore, to conclude the case in favour of the plaintiff, unless the further objection raised by Mr. Lilley must prevail. I found it difficult to understand the finding of the jury, that the plaintiff did not fully realise the risk. I could better have understood a finding, that he did not willingly incur it, seeing that he was constantly complaining of the danger, and incurred it at last only under express command of the overseer. But for this, or for almost every verdict of an honest jury, there is something to be said, and in this case it is, that the plaintiff might distrust his own judgment when the director of the work, the "boss" Lynch, ordered him to go on, and stood near to see the iron rod used, and the plaintiff's fears might have been quieted by the freedom from accident of the past five weeks.

The English cases I have chiefly consulted, are *Britton* v. *Great Western Cotton Company*, L.R., 7 Exch., 130; *Thomas* v. *Quartermaine*, 18 Q.B.D., 685; *Baddeley* v. *Earl Granville*, 19 Q.B.D., 423; *Thrussell* v. *Handyside & Co.*, 20 Q.B.D., 359; *Osborne* v. *The London and North Western Railway Company*, 21 Q.B.D., 220; *Yarmouth* v. *France*, 19 Q.B.D., 647; and *Caswell* v. *Worth and another*, 5 E. & B., 849. None of these cases shews a breach of statutory duty by both parties to the action, which is the objection made by Mr. Lilley to the plaintiff's right to recover.

The case nearest to this in its circumstances, is *Baddeley* v. *Earl Granville*, 19 Q.B D., 423. There, one of the rules established in the mine, under sec. 52 of *The Coal Mines Regulation Act, 1872*, required a banksman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the mine, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed in coming out of the mine at night, by an accident arising through the absence of a banksman. Held, that the defence arising from the maxim *volenti non fit injuria* was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer, and that the plaintiff was entitled to recover. In the present case, there was a breach of the statutory duty of the defendant Company in furnishing an iron tamping rod, which is part of the "machinery" of the mine under the interpretation clause in our *Mines Regulation Act*, 45 Vic., No. 6. So far, the case of *Baddeley* v. *Granville* would seem to apply. But Mr. Lilley pointed out that our Act differs from the English Statute in that it prescribes,—

> 14. That every person employed in or about a mine, shall satisfy himself of the safety of the appliances he uses; he shall cease to use anything unsafe;—

and that the plaintiff if he did not fully realise the danger, knew certainly the use of the iron rod was unsafe, which is all the statute requires, and not that he should fully realise the danger likely to result from its use. Then by sec. 17,

> Any person who does not comply with any of the provisions of this Act, shall be deemed guilty of an offence against this Act, and if he is any other person [than the owner or manager, or person in charge giving orders] shall be liable to a penalty of £10.

Now there is no provision of this kind in the English statute, on which their decisions have been delivered. Under our Act, the plaintiff and defendant were both offenders; the one in furnishing, and the other in using the dangerous iron tamping rod. The first part of the answer of the jury to the 13th question, "yes" that the plaintiff knew it was dangerous, and with that knowledge continued to use it, declared him an offender against the statute, and the injury to himself was consequent upon his own offence and disobedience to the law. He cannot plead compulsion in excuse of such a breach of the statute, which is peremptory in its terms,—"he shall cease to use anything unsafe." His act was extremely dangerous to himself and his fellow-workmen, and I think I would violate the policy of the law, if I allowed him to compensate himself for his own injury by recovering damages from his employers, the defendants. Section 11 of our Act it is true, enacts that

> Any person employed in a mine who suffers injury in person, may recover from the owner of such mine, compensation by way of damages, as for a tort committed by such owner.

But this is not an unqualified right; it is subject to the important qualification, that the injured person has not done what deprives him of the right to recover. Here the injury arose from the breach of a statutory duty on his part, as well as on the part of the defendants I think the objection must prevail, that he was engaged in an unlawful act, in a conscious breach of the law, and that he must bear the loss himself. There will be judgment for the defendants with costs.

Solicitors for plaintiff: *Chambers, Bruce & McNab*, Brisbane, agents for *Power*, Gympie.

Solicitors for defendants: *Daly & Hellicar*, Brisbane, agents for *Pattison*, Rockhamptton.

IN CHAMBERS.

HARDING, J. 3rd July, 1889.

In the matter of THE WILL OF ROBERT CAY, DECEASED.

Executor, a Company out of jurisdiction—Letters of Administration with Will annexed, to Attorney of Company.

Robert Cay, being domiciled in Melbourne, Victoria, died at Brisbane, in this Colony, having executed a Will, dated the 27th day of April, 1888, by which he appointed as his executor, The Trustees, Executors and Agency Company, Limited, a company formed and incorporated in Victoria, under *The Companies Statute, 1864*, of that colony, and having power by *The Trustees, Executors and Agency Company, Limited, Act*, a statute of that colony, to act as such executor.

Probate of the Will was duly granted to the Company, by the Supreme Court of Victoria. Part of the property of the deceased being situate in Queensland, the Company, by power of attorney, duly appointed John Henry Flower, of Brisbane, solicitor, as their attorney, to apply for Letters of Administration, with exemplification of probate of the said Will annexed, of the estate and effects of the said deceased, within the said colony of Queensland.

The Registrar of the Supreme Court refused to grant the application, as of course, on the grounds (1) that the Victorian Act, authorising the Company to act as executor, was not in force in Queensland, (2) that the Company had no power to delegate its functions to the petitioner as their attorney.

Wilson, in support of the petition, referred to *The Federal Council Evidence Act, 1886*, sections 3 & 6; *The Trustees, Executors and Agency Company, Limited, Act* (Victoria), sects. 1 and 23; and cited *Atkins* v. *Smith*, 2 Atk. 63; *Probate Act*, sect. 32; *In re Hope*, 1 Q.L.J. 11; *Jarman on Wills*, Vol. I, p. 6; *In the Goods of Earl*, 1 P. & D. 450; *Miller* v. *James*, 3 P. & D. 5.

HARDING, J., granted the order, as prayed.

Solicitors for petitioner: *Hart & Flower*.

HARDING, J. July 24th, 1889.

ROYAL BANK OF QUEENSLAND *v.* GURTBERG.

Practice—Garnishee order—Order XLIV. r. 2—Several debtors—Proviso as to costs.

On an application for a garnishee order *nisi*, against three several debtors for one sum,

Held that a separate order should be made against each debtor.

Byrnes, for the plaintiff, applied for a garnishee order *nisi*, against D. J. Russell, D. T. Seymour, Commissioner of Police, and The Mercantile Bank of Sydney, on a judgment dated the 20th July, for £136 17s., returnable the next Chamber day.

HARDING, J.: What authority have you for a joint garnishee order against a number of debtors?

Byrnes: No authority, except on the ground of convenience. At any rate, the order can be made joint in the first instance, and several when moved absolute.

HARDING, J.: That is entirely against the practice; if one of the parties successfully opposed the order, where would the rest be. An order must be made against each debtor on separate applications.

Order accordingly (form H. 31) against D. J. Russell, and why the costs of the garnishee proceedings and the order *nisi*, should not be added to the judgment and the whole paid out of the funds in the hands of the garnishee, if any, or if not, by the judgment debtor.

Similar order against D. T. Seymour.

Similar order against The Mercantile Bank of Sydney.

Solicitors for the plaintiff: *Chambers, Bruce and McNab.*

HARDING, J. July 24th, 1889.

IN INSOLVENCY.

Re MACFARLANE & CO., IN LIQUIDATION.

Practice—Insolvency Act, sec. 121—Evidence.

On an application for an order directing post letters to be re-directed and delivered to the trustee, some evidence of the necessity of the application is necessary.

Hellicar, for the trustee, applied for an order that post letters addressed to the insolvent should be re-directed by the Postmaster-General, to the trustee at Rockhampton.

There was no evidence adduced.

HARDING J.: As the wording of section 121, of the *Insolvency Act*, is discretionary, there should be some evidence of the necessity for the application on which the order is to be made.

Accordingly the application was adjourned for such evidence.

Solicitors for the trustee: *Daly and Hellicar.*

LILLEY, C.J. 1st August, 1389.

CALLAGHAN *v.* HUNTER.

Practice — Enforcement of Judgment of Lower Court—Members' Expenses Act of 1886—Attachment of Allowance for Members' Expenses.

The Court will not enforce the judgment of a lower court by attachment.

The allowance for expenses of members of the Legislative Assembly under the *Members' Expenses Act of 1886*, is privileged, and not subject to attachment by a judgment creditor.

Plaintiff had obtained a Small Debts' judgment for £15 8s. 9d., with £2 5s. costs, against defendant, who was a member of the Legislative Assembly for the electorate of Croydon. During the month of July defendant had been in attendance as a member at the sittings of the Assembly, and, under the *Members' Expenses Act of 1886*, had become entitled to £33 12s., or thereabouts, for his expenses of such attendance, which had become due to him from the paymaster of the Treasury at the end of the month.

Lilley, for plaintiff, applied for a garnishee order *nisi* upon the paymaster of the Treasury, attaching the moneys which had thus become due for expenses; and referred to the *Members' Expenses Act;* also to the *Judicature Act*, O. 44, r 2; that was copied from *C.L.P. Act of 1867*, s. 52, which was the same as s. 61 of the English Act of 1854, given in *Cababé on Attachment*, p. 63. It was doubtful whether the Court would enforce the judgment of an inferior court: *Jones* v. *Jenner*, 25 L.J., N.S., Exch., 319.

LILLEY, C.J.: I think on the question of construction—whether this Court will enforce the judgment of a lower court—that the plaintiff has no right to an order for attachment. This Court will not act as the handmaiden of a lower court. I do not think the rule applies here; this case does not come within it. If the rule had expressly said, "where a judgment of any court," &c., it would have been a different position. On that ground I will not grant the order *nisi*. As to the other question, I think that the defendant's money is privileged; it is an allowance for his attendance here in Parliament. I do not think that, if the paymaster of the Treasury were willing, the plaintiff could touch the defendant's allowance in his hands.

Solicitors for plaintiff: *Lilley & O'Sullivan.*

LILLEY, C. J. 2nd August, 1889.

In the matter of THE LICENSING ACT OF 1885, *and in the matter of* THE APPLICATION OF LAURENCE QUINN, OF SOUTHPORT, CONTRACTOR, FOR A LICENSED VICTUALLER'S LICENSE.

Licensing Act of 1885, sects. 115 and 124—Powers of Justices under third Local Option resolution.

In an area where the third resolution under the Local Option clauses of *The Licensing Act of 1885*, that no new licenses should be granted, had been adopted in November, 1888, and was in force, a license for certain premises had expired on 30th June, 1889. Appli-

8 Q.L.J. 115.

cation was made to the Licensing Justices for a certificate for a license of the same premises on 3rd July following, and was refused by them on the ground that sect. 124 of the Act, did not empower them to grant a certficate, when the old license had expired after the adoption of such resolution.

Held, that it was lawful for the Justices to grant a certificate for the license.

SPECIAL case stated by the Licensing Justices for the Licensing District of Brisbane, under sect. 226 of *Justices Act*. The facts are briefly as follow:—

The "Globe" Hotel, had been a licensed house for a number of years, and the last license granted for it expired on 30th June, 1889. The renewal of the license after that date had been refused under subsect. 7 of sect. 41, of *The Licensing Act of 1885*, on the ground that the house was no longer fit to be licensed. Before such refusal to renew, plans of alterations of and additions to the house were submitted to the Licensing Justices, for approval, but they had not been carried out. On 22nd November, 1888, notice of the adoption of the third resolution of the Local Option provisions, in sect. 115 of *The Licensing Act*, within the East ward of the Municipality of Brisbane (within which the "Globe" Hotel was), had been given to the Licensing Authority by the Returning Officer. On 3rd July, 1889, the application of Laurence Quinn, for a license, came before the Licensing Authority in due course for consideration, and wss adjourned to 17th July, and again to 24th July, and was then refused, on the ground that sect. 124 of *The Licensing Act*, did not empower the Licensing Authority to grant a certificate for a new license for premises previously licensed, when the old license had been allowed to expire, a resolution under subsect. 3, of sect. 115 of the Act having been adopted previous to the expiration of the said license, and on no other grounds.

The questions submitted were,—

The license of the premises of the "Globe" Hotel, having expired after the adoption of the third resolution of sect. 115 of *The Licensing Act of 1885*, to wit, "that no new licenses shall be granted," and the said resolution then being in force within the area, was it lawful for the Licensing Authority to grant a certficate for a licensed victualler's license to the said Laurence Quinn, for the said premises.

If the Court are of opinion in the affirmative, the decision of the Licensing Authority to be reversed, and the said Licensing Authority be directed to grant a certficate for the said license to the said Laurence Quinn.

If the Court are of opinion in the negative, the decision of the Licensing Authority to stand.

Byrne: Sect. 124 of *The Licensing Act*, did not prohibit the Licensing Authority from granting a certificate for the license, as at the time of the adoption of the third resolution of the Local Option provisions of *The Licensing Act* within the area, a license for the "Globe" Hotel was in force.

LILLEY, C. J.: My answer to the first question is, Yes; and to the second, let the Justices of the Licensing Authority enter adjournments, and decide upon the application.

Solicitor for applicant: *Winter*.

AUGUST SITTINGS OF THE FULL COURT.

REGINA *v.* KELLY AND OTHERS ON THE PROSECUTION OF JOSEPH AYRE.

5 Q.L.J. 41.
8 Q.L.J. 8.
8 Q.L.J. 61.
19 N.S.W.L.R. 30
19 V.L.R. 54
8 A.L.T. 90

Certiorari—Prohibition—Licensing Act of 1885, sects. 115, 116, 120, and 124—Local Option Poll, Third Resolution.

A poll in favor of the resolution that "no new license shall be granted for a period of two years" was taken at D., under section 115 of the *Licensing Act of 1885*, and notice thereof sent by the returning officer to the Chairman of the Licensing Authority, and to the Colonial Secretary, in accordance with section 120 Fourteen days' notice of the proposed poll had not been posted at the doors of all public schools, post offices, and railway stations in the area, as directed by section 116.

Held, that notice to the ratepayers, as required by section 116, is an essential preliminary to the taking of the poll. If it is omitted, or imperfectly given in any essential detail, the ratepayers' and returning officer's subsequent acts are without authority and illegal, and the acts of the Licensing Bench obeying the resolution invalid.

On an application by A. for a wineseller's license, subsequently to the adoption of the resolution, the Licensing Justices, in obedience to the returning officer's notice, refused the license. The Court being moved for a rule to the ratepayers and the returning officers to show cause why a writ of *certiorari* should not issue to the Chairman of the Divisional Board of D. to bring up the notice and subsequent proceedings,

Held, that the Justices had rightly obeyed the notice.

Held, also, that if the Licensing Justices had been joined, *certiorari* might have been granted, with prohibition and *mandamus*, as in *Regina* v. *Yaldwyn*, *ante*, 144; but that *certiorari* cannot be granted in respect of ratepayers' and returning officer's procedure, as the local option poll is not a judicial proceeding, but an electoral option or choice by the ratepayers. Prohibition is the proper remedy. Upon motion then made, a rule for prohibition to extend to the Justices, was granted.

Rule in *Regina* v. *Local Government Board*, *per* L. J. Brett, 10 Q.B.D., 320, approved.

MOTION, on 9th April, on behalf of Joseph Ayre for a rule *nisi* calling upon Thomas John Kelly and John Deane, returning officers, and Charles Frederick Plant and Joe Millican, ratepayers of the Dalrymple Division, to show cause why a writ of *certiorari* should not issue directed to Kelly, as the chairman of the Dalrymple Divisional Board, commanding them to bring up the proceedings relating to a local option poll held for Subdivision 1 of that Division, on 24th November, 1888.

Ayre was an applicant for a wine seller's license for a house in Boundary Street, Charters Towers, which is within Subdivision No. 1 of the Division of Dalrymple. He gave notice on 11th December, 1888, of his intention to apply for such license to the licensing authority at their next quarterly meeting, to be held on 2nd January, 1889. On 31st October, 1888, a number of ratepayers of No. 1 Subdivision of the Dalrymple Division, demanded and obtained a poll of ratepayers in the subdivision for or against the adoption of the third resolution under s. 115 of *The Licensing Act of 1885*—"that no new licenses be granted for a period of two years." The poll was held on 24th November, and the majority of votes polled being for the resolution, it was declared by the returning officer to have been carried; and notice thereof was given to the licensing authority of Charters Towers, through their chairman, and to the Colonial Secretary.

The licensing authority refused to grant the license to the applicant Kelly, in consequence of the resolution having been adopted.

The evidence was that notices of the intention to hold the poll on 24th November had been posted at the doors of *some*, not *all* the public schools, post offices, and railway stations within Subdivision No. 1 of the Dalrymple Division; and that they were not posted earlier than fourteen days before the holding of the poll; and that at the polling the ballot-papers issued to the ratepayers were not initialled by the returning-officer, nor were the numbers of the ratepayers marked upon them.

Griffith, Q.C., *Lilley* with him, moved for the rule *nisi*. *Certiorari* appeared to be the proper remedy in this case; the local option resolution was an order made by the ratepayers directed to the licensing authority controlling them in the exercise of their functions; *Reg.* v. *Justices of Surrey*, L.R., 5 Q.B., 466. The returning officer had not fulfilled the requirements of sect. 116 of *The Licensing Act of 1885*, as to notice. There was the further objection that the ballot-papers had not been marked with the voters' numbers, or initialled, as required by the *The Licensing Act*, sect. 118, and the *Divisional Boards Act of 1887*, sect. 73.

The COURT granted the rule *nisi*, as moved, returnable before them at the May sittings.

On 23rd May, *Griffith*, Q.C., *Lilley* with him, appeared to move the rule absolute. There was no appearance for the respondents.

Griffith, Q.C., in support of the rule, took the same grounds as upon the motion for the rule *nisi*: the provisions of sections 116 and 118 of *The Licensing Act* had not been observed, and the poll was therefore defective. The applicant had a personal interest here. He was shut out from obtaining a license in No. 1 Subdivision for two years; section 124. The resolution was a stay of judicial authority; it was an order made by the inhabitants to prohibit Justices exercising judicial functions. *Certiorari* would lie here. It was an analogous case to that of Commissioners of Sewers mentioned in *Comyn—Certiorari*, A 1, vol. 2, 334. This was *The Case of the Commissioners of Sewers for Yorkshire*, 1 Str. 609, and 1 Salk. 145.

Real, *amicus curiæ*, mentioned *Ex parte Ryan*, *In re Maud*, 10 Austr. L.T., 15.

Griffith: *Certiorari* was held to lie on a judgment given by the Censors of the College of Physicians for malpractice; *Groenwelt* v. *Burwell*, 1 Salk., 144. Every inferior court of record was there held to be liable to *certiorari*. Here the inhabitants of the district were constituted a court of record; they were authorised collectively to exercise jurisdiction under the *Licensing Act*.

HARDING, J., referred to *Rex.* v. *Lloyd*, Caldecott, 309; *certiorari* does not lie to remove any other than judicial acts.

Griffith: This was, correctly speaking, not a poll, but a resolution, a taking of the opinions of the inhabitants of a district.

LILLEY, C.J.: There is the objection here that these people were not a properly constituted body of ratepayers. They acted without the proper notice; they were a mob.

Griffith: *Reg.* v. *Justices of Surrey*, L.R., 5 Q.B., 466, was on all fours with this case. There the applicant was held to be entitled to a writ of *certiorari*, *ex debito justitiæ*, by reason of a peculiar grievance of his own, on the ground that the condition precedent of publication of notices as prescribed by statute had not been fulfilled, and that therefore the Justices had not jurisdiction: at p. 473, following *Arthur* v. *Commissioners of Sewers*, 8 Mod. Rep., 331. Referred also to *Reg.* v. *Newborough*, L.R., 4 Q.B., 585.

HARDING, J., referred to *The Colonial Bank of Australasia* v. *Willan*, L.R., 5 P.C., 417.

LILLEY, C. J.: Is not prohibition your proper remedy?

Griffith: If the Court thought *certiorari* would not lie, he would move them for an order absolute *ex parte* for a writ of prohibition, to go to the ratepayers, to the chairman, past and present, and to the Licensing Justices, under the *Crown Side Rules*, O. 12, r. 2. The remedies by *certiorari* and prohibition were co-extensive, but exercised under different conditions. Lord Justice Brett, in *Reg.* v. *Local Government Board*, 10 Q.B.D., 320–1, quoted in *Shortt on Informations*, pp. 433-4, held that the Court should exercise as widely as possible the powers of controlling by prohibition. Prohibition would go in this case.

C.A.V.

LILLEY, C.J., on 6th August, delivered the judgment of the Court:

THIS is a rule calling upon two ratepayers and two returning officers, past and present, of the No. 1 Subdivision of the Dalrymple Divisional Board, to shew cause why a writ of *certiorari* should not issue to the Chairman of the Dalrymple Divisional Board, to bring up the ratepayers' notice and all proceedings taken thereon, relating to the Local Option Poll, in Subdivision No. 1, on the 24th November, 1888. The grounds of the application are two, viz.:—(1) That the notices required by the *Licensing Act* before the poll is taken, had not been given; and (2) That the ballot papers had not been numbered as required by the same statute and the *Divisional Boards Act*.

The purpose for which the ratepayers' notice and subsequent proceedings are required to be brought before us, is that they may be quashed on the grounds above stated. We give no opinion on the objection to the validity of the unnumbered ballot papers, nor on the alleged consequent illegality of the poll. It is quite conceivable that there might be irregularities in the voting papers. which would not invalidate the resolution voted for by the ratepayers. We deal with the case entirely on the ground of the insufficiency of the notice to the ratepayers. By section 116 of the *Licensing Act of 1885*, the returning officer is required

Not later than seven days after receiving the notice from the ratepayers under sec. 115 to cause a notice to be affixed on or near the door of every public school, post office, and railway station in the area, &c., setting forth the purpose of the poll, &c., and specifying a day, &c., on which the poll will be taken.

The evidence is quite clear that a notice was affixed on *some* of the public schools and post offices, and on a railway station, but *not upon or near every one of those buildings* within the area. It is obvious that the behests of the law were not complied with. Nevertheless, a poll was taken, which resulted in the carrying of the third resolution, "No new licenses shall be granted" (sec. 115).

After the poll, the returning officer sent the statutory notices to the Minister and to the licensing authority having jurisdiction within the area (sec. 120). Subsequently a licensing meeting for the area was held, when Ayre applied for a new license, which the justices refused, as required by the statute after such notice (sec. 124). Now, it is a preliminary to the poll and of the very essence of the authority to take it, that the ratepayers should have previous notice in the manner prescribed by the statute. If this be omitted or imperfectly given in any essential detail, the returning officer who takes the poll does so without authority, and all his after acts are tainted with the original illegality. The subsequent notices to the Minister and the licensing authority are illegal; the resolution is ineffectual to bind the Bench, and in obeying it their acts are invalid. It is proved in this matter that the licensing authority, without knowledge, probably, of the illegality, acted upon the resolution. On our view of the law, as decided in *Regina* v. *Yaldwyn*, *ante*, p. 144, the justices in this instance did their duty—they obeyed without questioning the validity of the resolution and notice, thus avoiding the error of the Bench in the previous case. But no action of the licensing authority will cure the illegality of the returning officer's proceedings, and of the poll. This brings us back to the terms of the rule. The licensing authority has not been brought before the Court. The rule is limited to the ratepayers and the returning officer.

Is *certiorari* the appropriate legal remedy in this case? So far as our researches go, and nothing to the contrary was cited at the Bar, *certiorari* goes only to remove a judicial proceeding into this Court for the purpose of review. To complete these proceedings, the justices should have been included in the rule, and then *certiorari* might have been granted with prohibition and *mandamus*, which were held to be the appropriate remedies in *Regina* v. *Yaldwyn* and others. The proceedings of the returning officer and ratepayers cannot, we think, be regarded as judicial. They exercise an electoral option or choice which results in a resolution or administrative restriction on the judicial action of the licensing authority, and deprives it of jurisdiction, or limits it within a particular number or area, &c. No evidence is taken—there is no hearing, and no judgment is delivered It is, or may be, a declaration of the mere will or caprice, and not of the judgment of the ratepayers; and it would be a misuse of language to describe it in the terms used by counsel as "an order made by the inhabitants to prohibit justices exercising judicial function," if by such description a judicial order were meant. *Certiorari*, therefore, cannot be granted in respect of the ratepayers' and returning officer's procedure, unless by an entirely new departure from the established course of law. The case of *Regina* v. *Yaldwyn* furnishes the needed precedent so far as the ratepayers and returning officers are concerned. We adopt the rule laid down by Lord Justice Brett, in *Regina* v. *Local Government Board*, L.R., 10 Q.B.D., 320, 321, "I think I am entitled to say this, that my view of the power of prohibition at the present day, is that the Court should not be chary of exercising it; and that whenever the legislature entrusts to any body of persons, other than to the Superior Courts, the power of imposing an obligation upon individuals, the Court ought to exercise, as widely as they can, the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." We can prohibit their further action on the illegal poll, resolution and notice, for it is an unlawful restraint upon the judicial action of the licensing authority. This will relieve the licensing justices, after notice of this rule, from giving effect to the resolution. Should the licensing authority, however, on a further application act upon the resolution and refuse to grant a license, a rule for a *certiorari* to bring up their order might be applied for—as in *Yaldwyn's case*—because the hearing of these applications under the *Licensing Act* is a judicial proceeding, consequently the decision of the licensing authority is a judicial determination or order which may be brought before this Court for

review by writ of *certiorari*. The rule, therefore, will go in the modified form finally asked for by the counsel for the mover—as a rule for prohibition There will be no costs, and the prohibition will extend to the justices. Rule absolute for prohibition.

Solicitors for applicant · *Daly & Hellicar*, agents for *Marsland & Marsland*, Charters Towers.

AUGUST SITTINGS OF THE FULL COURT.

WOONGARRA DIVISIONAL BOARD *v.* FLEMING.

Rates—Valuation Act of 1887 (51 Vict., No. 4), and Valuation Act Amendment Act of 1888 (52 Vict., No. 9), sect. 4.

F. was the tenant of fifteen allotments, which he had purchased at an auction sale. These allotments were contiguous, and were part of the original section and block which had been subdivided for purposes of sale. F. had not yet got a transfer, but intended to have the fifteen allotments registered as one block, and to get one certificate of title. The valuer for the Divisional Board of W. had assessed F. in respect of each allotment as a separate property.

Held, that, being held under one title, the land was rateable as one piece of land.

Foxton v. *Indooroopilly Divisional Board*, 1 Q.L.J., 173, assented to.

SPECIAL case stated on the application of the Woongarra Divisional Board, under section 4 of the *Valuation Act Amendment Act of 1888*, and section 226 of the *Justices Act of 1886*.

1. The respondent was the purchaser and proprietor of fifteen subdivisions or allotments of land in the County of Cook and Marine Township of Barolin, being the whole of a certain section, excepting five allotments. The said fifteen allotments are contiguous and adjoin each other, and are unfenced, unimproved, and unoccupied.

2. In or about the month of May, 1889, the appellants caused valuations of the said several subdivisions or allotments to be made, and the respondent was assessed in the sum of £3 as (minimum value) in respect of the annual value of each of the subdivisions or allotments in paragraph 1 hereof mentioned.

3. The respondent, thinking himself aggrieved on the ground of incorrectness in the said valuations, gave due notice of appeal to the justices sitting in the Court of Petty Sessions for the District of Bundaberg, holden at Bundaberg, and being the nearest Court of Petty Sessions to the said Division of Woongarra.

4. On or about the 8th day of July, 1889, the matter of the said appeals was heard before Theophilus Parsons Pugh, Police Magistrate for the District of Bundaberg; and the said police magistrate reserved his decision; and on the 12th day of July, 1889, the said police magistrate gave his decision, and reduced the said net annual valuation of the said lands from £45 to £10.

5. On the hearing of the said appeals, the respondent objected to the principle upon which the said valuations were made, on the following ground:—That the said fifteen allotments should be valued as a complete block, being all contiguous to one another. After argument the police magistrate upheld the said objection.

6. The only evidence taken at the hearing of the said appeal was that of the respondent, Robert Fleming, and Joseph Nixon, clerk to the appellants, which was in the words or to the effect following:—Robert Fleming, the respondent, stated that he knew fifteen allotments situated at Barolin, for which he was rated; he produced the valuation notices; that all these properties were in one section and one block adjoining one another. . . . . He had not got a transfer; he bought it for the purpose of having it all in one block; there was three and a-half acres in all; it was about nine miles away from Bundaberg; it was his intention to get one deed for the land. . . . . The allotments were contiguous, and contained all the allotments in the section except five. And in cross-examination by Mr. Payne, stated — that he bought them by reference to a plan in an auctioneer's room; the plan showed all these allotments divided into separate allotments of a quarter-acre each; he could, if he chose, have fifteen title deeds for the fifteen allotments; the allotments were all different prices; he did not sign a sale note for each one; they were all put together. And in answer to the Bench, stated he bid for each one separately, and purchased each one separately. Joseph Nixon stated that he was clerk and valuer to the appellants, the Woongarra Divisional Board, and that he knew the respondent; he knew the fifteen allotments; the respondent was rated for the property in question; they were in the Barolin Marine Township, and he valued them separately; he thought they were quarter-acres. . . . . He arrived at the valuation by section 4 of the *Valuation Act*, and also in consequence of the Audit Department regulations; in consequence of the instructions from the Audit Department, the valuation was made at £3 instead of £2 10s., as specified by the *Valuation Act*; the department supplied books, which have columns only allowing for pounds, and not for shillings. . . . .

The appellants being dissatisfied with the decision of the said police magistrate upon the objection raised by the respondent as to the principle upon which the valuation was made, gave due notice of appeal.

The questions for the opinion of the Court are—

1. Whether the Police Magistrate was right in upholding the objection raised by the respondent as to the principle upon which the valuation of the said lands was made on the grounds in paragraph 5 hereof mentioned.

2. Whether the principle upon which the said valuation was made by the appellant was correct; that is to say, whether the appellants were right in assessing the respondent in respect of each of the allotments or subdivisions

in paragraph 1 hereof mentioned, and not in respect of the said lands as a whole.

Byrnes, appeared on behalf of the Divisional Board, the appellants; and *Lilley* for the respondent, Robert Fleming, opposed.

Lilley cited *Foxton* v. *Indooroopilly Divisional Board*, 1 Q.L.J., 173; under that decision the Board must deal with respondent's land as one block, until he subdivided it and dealt with it as consisting of several pieces.

Byrnes, *contra*.

LILLEY, C.J.: I give my assent to the judgment of my brother Harding in *Foxton's case*, which, I think, governs this case; but I reserve the expression of my opinion, should the owner of the land hold it under several separate titles. Here there are fifteen pieces of land capable of being put in a ring fence; and the owner not having fifteen titles, and saying he intends to put them under one title, it is one block of land. I am of opinion that the magistrate was right. The owner can take out the subdividing pegs, and make it one block of land, under one title. Neither my brother Harding nor I decide the question, if he divide it afterwards, and take different titles. If a man holds by one deed, one title, he holds, in effect, one piece of land, even though he buys it in a hundred separate pieces, and then draws the pegs. This is one piece of land, which he has bought in fifteen different pieces; and if he holds it under one title it is rateable as one piece of land.

Our answers are—to question No. 1, Yes; to No. 2, No. We order the costs of the case to be paid by the Divisional Board.

Solicitors for appellants: *Petrie & O'Shea*, agents for *Payne*, Bundaberg.

Solicitors for respondent: *Roberts & Roberts*, agents for *Hamilton*, Bundaberg.

LILLEY, C. J. 29th July, 1889,
19th August, 1889.

SPARKS *v.* HARPER AND CO.

Trade Mark—Restraining Order—Registration—Descriptive words—"Patents Designs and Trade Marks Act of 1884" (48 Vict., No. 13), sect. 63, sub-sect. 1, par. c, and sect. 76.

Plaintiff had obtained registration under *The Patents Designs and Trade Marks Act of 1884*, of a trade-mark for a mixture of coffee and chicory, called French Coffee, bearing a design with the words "Finest French Coffee, as prepared and used in the principal towns of France—Café Parisienne." It was alleged on affidavit that he had user of the trade-mark, and had been the only vendor of French Coffee in Queensland, until recently, when the defendants began to sell a similar description of goods under the name of "Zouave Imperial French Coffee and Chicory."

Held that the words "French Coffee" were descriptive words, and therefore not capable of registration; and that plaintiff was not entitled to a restraining order. *Van Duzer's Trade Mark*, 34 Ch.D., 623, followed. On the ground of alleged sole user of the name—"French Coffee," and that there was matter to be tried, the restraining order was continued until hearing.

PLAINTIFF was the vendor of a preparation of coffee, which he sold in tins with a wrapper or label, which had been registered as a trade-mark under *The Patents Designs and Trade Marks Act of 1884*, and which bore a design and the words "Finest French Coffee, as prepared and used in the principal towns of France—Café Parisienne." It appeared on affidavit that plaintiff had had the use of this trade-mark for about 4½ years. Defendants' label, which was alleged to be an infringement of the plaintiff's trade-mark, bore a coloured picture of a French Zouave soldier, and the words "Zouave Imperial French Coffee and Chicory." On behalf of plaintiff it was sworn that plaintiff was the only trader who had until recently used the words "French Coffee," and sold goods under that description, in Queensland. For defendants, it was alleged that the words were always used in the trade to describe a particular preparation of coffee and chicory, produced by a well known method.

Real, *Lilley* with him, appeared on behalf of the plaintiff; and *Sir S. W. Griffith*, *Q.C.*, *Feez* with him, for the defendants.

Real moved for a restraining order until hearing.

Griffith, *Q.C.*: Under the decision in *Van Duzer's Case*, 34 Ch.D., 623, the words "French Coffee" were not capable of registration. *Waterman* v.

Post p. 201.

Ayres, 39 Ch.D , 29, following *Van Duzer's Case* and *Hanson's Case*, 37 Ch.D., 112, show that the words "French Coffee" are descriptive, and therefore cannot be registered. Plaintiff then could not acquire a right to sue here on his registered trade mark : *Valvoline Case*, *Leonard and Wells' Trade Mark*, 26 Ch.D., 288 at 296; under sect. 76 of *The Patents Designs and Trade Marks Act*, plaintiff must prove that he had a valid trade-mark, or that he had a sole right--a monopoly to use it in this country. *Singer's Case*, 8 App.Ca., 16, and *Thorley's Food Case*, 14 Ch.D., 763. His right under the Act was gone; and as to his claim of sole right to use the trade name, there was evidence that it was descriptive of an article known by that name all over the world.

Real, contra. Notwithstanding the Act, which was against his right to registration, "if a term become known in the country" as the name of a man's goods, the Court will protect him from the fraudulent use of that term by others. Plaintiff had had sole use of the trade name for many years, until defendants had taken it. The *Alpine Case*, 29 Ch.D., 877; *Radder* v. *Norman and Norrish*, L.R., 14 Eq., 348; *McAndrew* v. *Bassett*, 4 D.G.J. and Sm., 380; *Apollinaris Water Case*, 33 L.T., N.S., 242; Plaintiff had a sole right to the name of "French Coffee" by long user.

C.A.V.

LILLEY, C.J., delivered judgment as follows:—This is a motion by the plaintiff, Benjamin Sparks, to restrain the defendants' firm from the use of a trade-mark until the hearing of the action between them. An order was asked to restrain the defendants from continuing the use of two words —"French Coffee"—on a label on their goods, being in fact coffee and chicory which they were vending. The grounds of the application were, first, that the use of the words "French Coffee" was an infringement of the trade-mark of the plaintiff, and second, that, by using the words "French Coffee," the defendants were leading the public to suppose and believe that the coffee which they were selling was in fact the plaintiff's coffee.

There are two modes of protection for the accustomed description of traders' goods. The first is under *The Patents, Designs and Trade Marks Act of 1884*, and the second is that old rule of the law, that a man is not allowed to vend or attempt to vend goods, under a description which will lead the public to suppose that they are the goods which they have been accustomed to purchase under that description, as the goods of another trader. The first question that arises here is the one under *The Trade Marks Act*. There is no doubt that the plaintiff had obtained a trade-mark, being a label in which the words "Finest French Coffee" are used, and they are used with these additional words, "as prepared and used in the principal towns of France. Café Parisienne." Now, if the words "French Coffee," the words to which plaintiff's counsel limited himself at last, are not words which can be registered as a trade-mark, the plaintiff cannot have protection, notwithstanding the act of registration. What words then, can be registered? Under s. 63, ss. 1, par. c, of *The Trade Marks Act*, there must be "a distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." Under none of these could this label be registered, and on that point the contention of counsel was abandoned. He must confine himself to the concluding words of the subsection—"fancy word, or words not in common use." At the time the rule was applied for, I intimated my opinion against the plaintiff, and that I at all events had very grave doubts, whether the words "French Coffee" could under any circumstances be registered as a trade-mark. I have since looked at the authorities, and, after consideration, have not altered the opinion I held on that occasion. The principal authority is *Van Duzer's case*, L.R., 34 Ch. D., 623. I may point out here that by s. 76 of the Act, if there are not words which could be the subject of registration, why then the plaintiff, by virtue of the section, is disentitled from suing for any infringement of the trade-mark.

A person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement

of a trade-mark, unless, in the case of a trade-mark capable of being registered under this Act, it has been registered in pursuance of this Act.

This has been registered in pursuance of this Act, but, to my mind, it is not capable of being registered; and therefore he is disentitled. In what way can these words be shown to be fancy words. To be fancy words they must be words non-descriptive of the article which they are intended to cover. Let us look at the facts here.—plaintiff was selling coffee; the word "Coffee" describes the article under the label, and "French Coffee" is descriptive of the kind or quality of coffee covered by the label. Then, it is not only "French Coffee," but, "as prepared and used in the principal towns of France." I do not think there could be a more descriptive label than this of plaintiff's; it fully describes the nature and quality of the article which he intended to sell under that label. That being so, I cannot hold them to be fancy words. Lord Justice Cotton, in his judgment in the case of *Van Duzer's Trade Mark*, 34 Ch.D., at 635, says:—

What we have to consider is, whether the two words which are desired to be registered under the Act are fancy words within the meaning of subsect. 3 of sect. 64 of the Act of 1883. It has also to be considered whether they are "distinctive" and "not in common use; but the stress of the argument on each side has been on the question, whether these two words desired to be registered can be considered "fancy words" within the meaning of that section.

He then goes on to say that the words in that particular case are not fancy words; he thinks they are descriptive, and that to be fancy words they must be non-descriptive of the particular article which is covered by the label bearing them. Further on he goes on to say:—

To be registered it must be a fancy word; and, in order to come within that description, it must be a word which obviously cannot have reference to any description or designation of where the article is made, or of what its character is.

Lord Justice Lopes says:—

I adhere to the two definitions I gave of that expression ["fancy word"] during the course of the argument. I think a word to be a fancy word must be obviously meaningless as applied to the article in question.

Then Lord Justice Lindley said, words must be obviously meaningless to be fancy words, but that is corrected with his consent by Lord Justice Cotton, as follows:—

It should run, not "obviously meaningless," but "obviously not intended to be descriptive."

The words used on a trade-mark must be non-descriptive of the particular article for which they are used. On that ground, I think registration should not have been made of the words "French Coffee." So, under that head, the use of those words by defendants would not entitle plaintiff to a restraining order.

Then there is the old question, whether the words have been so used by the defendants as to pass off their goods as the goods of the plaintiff.

It appears that plaintiff has had the use of his trade-mark for four-and-a-half years; and that his goods under that description have been in the market. There is evidence of this,—that these goods have been in the market under that description. There is also evidence that the defendants have been selling coffee under a different label, describing it as "Zouave Imperial French Coffee and Chicory." It must be understood, that I am not going into a discussion of the facts in the case. I think there is matter to be tried,—whether the defendants have not brought themselves under that rule, and whether they have been breaking the law in selling coffee under this label, so as to lead the public to believe that it was the French coffee of the plaintiff. I think there is matter for trial, and that the restraining order must be continued until hearing in respect of the user of the name "French Coffee." There will be a restraining order until hearing against the subsequent user of the trade name, upon the plaintiff giving the usual undertaking as to damages. Costs, costs in the action.

Solicitors for plaintiff: *Wilson & Newman-Wilson*.

Solicitors for defendants: *Hart & Flower*.

IN INSOLVENCY.

LILLEY, C.J. 12th August, 1889.

In the matter of AN INSOLVENCY PETITION AGAINST JOHN J. F. RODE, BY N. W. RAVEN;

And in the matter of THE PROCEEDINGS FOR LIQUIDATION BY ARRANGEMENT INSTITUTED BY JOHN J. F. RODE.

Insolvency Act of 1874 (38 Vict., No. 5), Sections 67 and 202—Practice—Petitioning Creditor's Costs of Petition when Debtor's Estate is in Liquidation.

A creditor having petitioned for the adjudication in insolvency of a debtor, a meeting of creditors of the estate was held, and a resolution was adopted to put the estate into liquidation.

Held, that the petitioning creditor was entitled to his costs of the petition up to the time of the estate being put into liquidation. *In re Bunnett*, 3 Ch. D. 320, followed.

Raven had filed a creditor's petition in insolvency against Rodé; and at a meeting of creditors, held after the filing of the petition and before adjudication, a resolution was adopted to put the estate into liquidation. Raven had opposed the adoption of the resolution, but was not supported by any of the creditors.

Rutledge, for the petitioning creditor, moved that the trustee should pay the creditor's costs of his petition out of the estate under liquidation, and cited *In re Bunnett, Ex parte Jeavons*, 3 Ch. D. 320.

Lilley, for the trustee, opposed.

LILLEY, C.J.: The old rule in Bankruptcy was that the petitioning creditor benefited the estate by petitioning, and secured a general distribution of the assets among all the creditors. I think this case comes within that cited by Mr. Rutledge. A fraudulent preference is obviated by the action of the petitioning creditor. Raven secured a general distribution of the assets, even though he did not secure a seconder for his motion to put the estate in insolvency. If he had succeeded in getting the estate into insolvency, he would have had his costs; but because the debtor persuaded the other creditors to put his estate into liquidation, it is said the petitioner should not have his costs. I think it is a reasonable allowance to give him his costs up to the date of the liquidation. Let him have his costs out of the estate up to the time of the resolution for liquidation, to be taxed, and costs of this motion, in priority; and let the trustee have his costs of the motion out of the estate.

Solicitors for petitioning creditor:—*Atthow & Bell.*

Solicitor for trustee:—*Winter.*

HARDING, J. August 28th, 1889

Re JAMES SIMPSON.

Practice—Examination of witnesses in Insolvency—Order for examination of witnesses.

Upon a solicitor appearing to examine on behalf of a witness.

Held that he had no *locus standi*.

Held also that an order for an examination of witnesses must specify the names of such witnesses.

EXAMINATION of witnesses in insolvency.

Feez, for the trustee, appeared to examine witnesses in the estate of the insolvent.

Foxton rose to appear on behalf of Ellen Simpson and Charles E. Simpson, witnesses.

HARDING, J.: What right have you here? You have no *locus standi*. You can sit and hear the evidence and take notes.

Foxton: I am not prepared for this objection, and have no authorities, but am informed that counsel appeared for a witness in the insolvency of *R. Wilson*.

HARDING, J., then referred to the Registrar, who remembered no practice of this kind.

Foxton, then stated that he had just been instructed to appear for the insolvent.

HARDING, J.: The order for examination only mentions the number of witnesses, and not their names. That is not sufficient.

Feez, applied to amend the order, by inserting the names of the witnesses.

Leave was given to amend, and the examination continued in the usual way.

Solicitors for trustee: *Hart & Flower.*

Solicitors for insolvent: *Foxton & Cardew*, and *Petrie & O'Shea*.

IN CHAMBERS.

HARDING, J. August 30th, 1889.

Re THE WILL OF WILLIAM HICKEY, DECEASED.

Ecclesiastical Jurisdiction—Executors' accounts—Commission—Extension of time for passing accounts—Time for filing first account—Fifteen months—Costs.

On an application to pass executors accounts nine years after the death of the testator, no commission and no costs allowed.

Harold Lilley, for Eugene Lackey, and B. J. Clune, the executors of William Hickey, deceased, applied to pass their accounts filed on the 6th August, 1889, from the 26th June, 1880, to the 23rd May, 1889; and to extend time for passing the accounts for twelve months; and to allow a commission of 2½ per cent. on the amount collected; and to allow the executors their costs, including their costs, charges, and expenses of passing their accounts, and of this application. From the certificate of the Deputy-Registrar, and the affidavit of the executors, it appeared that the testator died on the 26th June 1880.

HARDING, J.: From this it appears that nine years have elapsed since the death of the testator before the accounts were filed, and no notice of such delay has been given to me in accordance with the practice.

Lilley: In paragraph seven of the affidavit of the executors, they state that they did not apply to pass accounts before, as in their opinion the assets were not sufficient to justify the expense.

HARDING, J.: The accounts ought to have been passed within fifteen months, and the estate should be wound up with all speed.—*A. & O.* p. 865. I consider this a very bad case.

Order accordingly to pass accounts; no commission allowed; extend time for one month; disallow the executors their costs of passing the accounts.

Solicitors for the executors: *Lilley & O'Sullivan.*

HARDING, J. September 6th, 1889.

FITZWALTER *v.* VAL DARE OPAL CO., LIMITED.

Practice—Order XIV. r. 1a—Final Judgment—Affidavit of debt—Specially endorsed writ—Service.

A supplementary affidavit, stating that the defendant had entered an appearance to a specially endorsed writ, served subsequently to a summons for final judgment, does not cure the original defect, and consequently the summons was dismissed.

SUMMONS for final judgment.

Chambers applied for leave to sign final judgment as per summons.

O'Shea, for defendant, pointed out that the plaintiff's affidavit did not mention that an appearance had been entered by the defendant to a specially endorsed writ under Order XIV. r. 1a.

Chambers: That defect is cured by a supplementary affidavit.

HARDING, J.: This additional affidavit was not served with the summons as the rule requires. I have no power to give leave to defend; the summons is dismissed with costs.

Solicitors for plaintiff: *Chambers, Bruce & McNab.*

Solicitors for defendant: *Petrie & O'Shea.*

HARDING, J. September 9th, 1889.

BRITISH AND AUSTRALASIAN TRUST AND LOAN COMPANY, *v.* JOHNSTON.

Mortgage—Sale—Leave to bid—Equity of redemption—O. LVIII., a. r. 5—Notice.

Leave was given to a mortgagee to bid at a sale of an equity of redemption under a *fi. fa.*

Held, that, by "Sale by order of the Court," is meant a sale in a Chancery suit, not under a *fi. fa. Semble* summons should be served on the opposite party.

SUMMONS for leave to bid at a sale.

Byram for plaintiffs, mortgagees of an equity of redemption, applied for leave to bid at a sale under a *fi fa.* By order LVIII., a. r. 5, an Equity of redemption may be the subject of a *fi. fa.* In *Fisher* on *Mortgages, 490*, a mortgagee who sells (except where in judicial sales he obtains leave to bid), or his trustee, are not allowed to purchase the mortgaged estate.

HARDING, J.: This is not a sale by order of the Court; this is merely a sale under a *fi. fa.* By judicial sales is meant a sale by order of the Court in a Chancery suit, as for foreclosure, etc. I do not see the necessity for leave. Has the other side had notice of the application? The defendant is not here.

Byram submitted that notice was not necessary, and cited two similar cases decided by The Chief Justice,—*British and Australasian Loan and Trust Company*, v. *Dalton*, and *Oxley* v. *Ainley*, where no notice had been given.

The application was then withdrawn, and on a subsequent date renewed, when the leave to bid was given, after reading an affidavit of service on the defendant.

Solicitors for the plaintiffs: *Rüthning & Byram.*

HARDING, J. 12th September, 1889.

KIRKBRIDE AND OTHERS *v.* MINISTER FOR JUSTICE, AND THE NEW DAY DAWN FREEHOLD GOLD MINING COMPANY, LIMITED.

Practice—Parties—Application to strike out a Defendant—Order XVI., rr. 13, 14—Minister for Justice—Gold Fields Act, 1874, s. 15—Claims Against Government Act, ss. 2 and 7.

A gold mining lease having been granted, and rent paid, one O'F. came in and stated that the mine was not worked according to regulations. The question then came on before the Warden, who recommended the lease to be cancelled, which was done by the Government. A lease of the land in question was then made to another Company.

Held, in a suit to set aside the forfeiture and to recover possession, that the Minister for Justice was not rightly joined in the action, and an application to strike out his name as a defendant was granted with costs.

Semble, the plaintiffs' remedy is under the *Claims against Government Act*.

SUMMONS to strike out the name of the Minister for Justice as a defendant.

From the evidence it appeared that the plaintiff, Richard Kirkbride, the holder of a miner's right, obtained a lease of certain lands at Charters Towers, and subsequently assigned the lease to the Day Dawn Gridiron Gold Mining Company. One O'Flynn complained to the Warden that the said lease was liable to forfeiture on the ground that the mine was not being *bona fide* worked for the purposes for which it was demised. An inquiry was held by the Warden, who recommended the lease to be forfeited. The Executive accordingly declared the lease forfeited. The New Day Dawn Freehold Gold Mining Company then made application for a lease of the forfeited land. The plaintiff Company were then ejected, and the new Company entered into possession and occupation.

An action was then instituted for the recovery of possession of the aforesaid land, and for a declaration of the invalidity of the forfeiture of the lease, and for an injunction against the defendants. The Minister for Justice was joined as a defendant with the New Day Dawn Freehold Gold Mining Company, Limited.

Real, for the Minister for Justice, applied to strike out the name of the Minister for Justice as a defendant under *Order XVI., rr. 13, 14.*

Lilley, for the plaintiff: This is a claim to set aside a forfeiture. The Minister for Justice is here incidentally to watch the proceedings. The Crown is our landlord. The Attorney-General could be joined long before the *Claims against Government Act.* The forfeiture was declared by virtue of *sec. 15, Gold Fields Act, 1874.*

HARDING, J.: This looks like an appeal from an act of the Executive, which should not be by an action. *Claims against Government Act, s. 7.*

Lilley: This is not a suit for specific performance. Two adverse grants of the Crown are in question. The Attorney-General can be joined; *Hovenden v. Annesley, 2 Sch. & Le. 617.* We contend that the Crown has meddled with us, and we want to be left alone. *Mitford, Pleadings, 30., 31.*

Real: You claim a declaration setting aside a forfeiture.

HARDING, J., referred to *Calvert on Parties, 386, 387.*

Lilley: The gist of the action is to recover possession of the land, as between the two companies.

HARDING, J.: No; the question is, who is the tenant of the Crown? You cannot alter the tenure from the Crown.

Lilley: We cannot alter the Crown's grant without the Crown being here. We want an indorsement as to which grant is correct. The Minister for Justice, having appeared, is just like anyone else submitting to the jurisdiction of the Court. He is the Law Officer of the Crown.

HARDING, J.: He protects the interest of the public, as in a charity suit.

Lilley: The *Claims against Government Act* is not applicable; section 7 is limited. We want to rectify our own deed.

HARDING, J.; That section mentions "recovery of land." You want to alter a Crown deed, and interfere with the tenure of property. All Crown rights are dealt with now under statute. The grant may be void for uncertainty of parcels; if so, the whole thing reverts to the Crown. There would be no necessity for section 7, if the Attorney-General could alter the judgment.

Lilley: The petition of right was applicable prior to this Act. Before that Act we had a right to come.

HARDING, J.: You have a right to come, but have not come the right way. The section mentions "every species of relief," and "restitution of rights" covers everything.

Real: Before applying to strike out the name of the Minister for Justice, we drew your attention by letter to the *Claims against Government Act.*

HARDING, J.: The order is granted as prayed with costs.

Solicitor for the Minister for Justice: *J. H. Gill, Crown Solicitor.*

Solicitors for the plaintiffs: *Wilson and Newman Wilson.*

HARDING, J. 13th September, 1889.

MUIR *v.* SHUNN.

Practice—Parties—Third Party—Order XVI., r. 13—Tort—Local Government Act (42 Vic., No. 8), ss. 160, 250, 271, 272—Indemnity.

S., a contractor, constructed a sewer through land of M., by authority of the municipality of S.B.; M. sued S. for trespass; S. applied to join municipality as a defendant.

Held, that a joint tort-feasor ought not to be joined as a defendant.

SUMMONS to join a third party as defendant.

Woolcock for defendant: This is a summons under *O. XVI, r. 13*, to add the Municipality of the Borough of South Brisbane, as a defendant in this action. A contract to construct a sewer was made by the said municipality with the defendant, by virtue of ss. 160 and 250 *Local Government Act.* The defendant entered the lands of the plaintiff (ss. 270-271) in the course of the construction, and is now sued for trespass.

HARDING, J.: Then this is a tort, and you seek to add a joint tort-feasor.

Woolcock: We wish to add them to shew our authority, and to prevent a separate action against the municipality.

HARDING, J.: You can plead justification.

Woolcock: The question of indemnity under the new *Health Act* may arise.

Chambers for the plaintiff, objected on the ground of the action being for tort, and submitted that the question of indemnity did not arise. *Sanders & Co.* v. *Peek*, *50 L.T., 630;* and *Annual Practice, 322.*

HARDING, J., referred to *Catton* v. *Bennett*, 26 Ch. D. 151.

Order: Summons dismissed, except as to extension of time for 14 days for defendant to deliver his statement of defence. Plaintiff to have his costs of this summons.

Solicitors for the plaintiff: *Chambers, Bruce & McNab.*

Solicitors for the defendant: *Rüthning & Byram.*

SEPTEMBER SITTINGS OF THE FULL COURT.

In the matter of the Petition of LOUISA BURKE.

Practice — Petition in Insolvency — Alteration after signature and attestation.

A petition once signed and attested must not be altered except by petitioner with proper attestation.

PETITION by Louisa Burke, of Herberton, housekeeper, for adjudication in insolvency, referred to the Court by Mr. Justice Harding in Chambers.

His Honor detected an alteration in the petition, which was admitted by the solicitors representing petitioner to have been made subsequently to the signing and witnessing of the document. This alteration was the addition, to the words, "The petition of the undersigned, Louisa Burke, of Herberton, in the Colony of Queensland, housekeeper," of the descriptive word "widow."

Lilley appeared for Messrs. Daly & Hellicar, the agents for the solicitor for the petitioner, and admitted the mistake, which had been made by a clerk, in altering the petition, and expressed their regret that it should have happened.

LILLEY, C.J.: This is playing with fire—to alter an instrument,—and familiarity with this proceeding may tempt a man to do wrong in the end. These papers should be presented to the Court in the form in which they were signed and attested. Under the circumstances, that an apology and explanation have been made, we will not impose a fine, otherwise we might have done so. It must be understood that such a thing must not occur again. If instruments are insufficient, they must be sent back to the parties forwarding them for amendment. They must not be presented to the Court under circumstances that might indicate some fraudulent practice. As the solicitors say there was no intention to mislead the Court and express their regret,—as there was no intention to abuse the practice of the Court,—we accept their apology and explanation. There will be no further order.

Solicitors for petitioner: *Daly & Hellicar*, agents for *Ringrose*, Legal Practitioner, Herberton.

BYRNES *v.* JAMES AND OTHERS.

Officers of the Court—Appointment without certificate or sanction of Judges—Taxing Officer—Constitution Act of 1867 (31 Vict., No. 38), sec. 14—Supreme Court Act of 1867 (31 Vict., No. 23), sec. 39—Judicature Act (40 Vict., No. 6), O. 60, r. 1.

The office of taxing officer in the Supreme Court office was created, and a gentleman appointed to fill such office, by the Executive, without the certificate in writing of the judges to the Governor, that such office was necessary, having been given. The taxing officer was appointed to relieve the registrar of the Court from the duty of taxing bills of costs. Upon the appointment being brought to the knowledge of the Court—

Held, that the office was a new office under the *Supreme Court Act of 1867, sec. 39.*

Held, also, that the appointment having been made without the certificate of the judges, as required by the same section of that Act, it was an irregular and illegal appointment, and his acts as such officer were void.

THE plaintiff, Byrnes, had obtained and signed judgment in the action, with costs, and the bill of costs had been filed for taxation. They were taxed before Mr. E. Baines, who had been gazetted as taxing officer of the Court, and occupied a room in the offices of the Court. The bill came before Mr. Justice Harding at Chambers for review of the taxation, and His Honor referred the matter to the Full Court for decision upon the legality of the appointment, which he intimated to be in his opinion contrary to *The Supreme Court Act of 1867*.

Lilley appeared for plaintiff to seek to hold the allocatur of the so-called taxing officer.

HARDING, J.: It would be as well if the registrar read the correspondence between the Crown Law Officers and himself, which it appears has taken place in reference to this appointment. As judges, we have had no notice of the appointment. We find this stranger here, and we want to know how he got in.

LILLEY, C.J.: We are agreed upon the advisableness of appointing a taxing officer, but the objection is, that this gentleman has been thrust amongst the records without the judges being consulted. Let the correspondence be read.

THE REGISTRAR then read the following:—

The Crown Law Offices,
Brisbane, 5th August, 1889.

SIR,—I have the honour to inform you, that Mr. James Edward Baines has been appointed taxing officer in the office of the registrar of the Supreme Court, at a salary of four hundred pounds per annum.

The public notification of this appointment, which takes effect from the 1st August, will appear in the *Gazette* of Saturday next.

I have the honour to be, Sir,
Your obedient servant,
WM. CAHILL, Sec., C.L.O.

The Registrar, Supreme Court, Brisbane.

117, Queen Street, Brisbane,
9th September, 1889.

THE MINISTER FOR JUSTICE,
Offices, Supreme Court House.

Byrnes *v.* James and others.

SIR,—We have the honour to inform you that a question has been raised by His Honor Mr. Justice Harding, as to the validity of the appointment of Mr. J. E. Baines, as taxing officer of the Supreme Court.

We took out a summons in the above case to review a taxation of Mr. Baines, which came on for hearing before Mr. Justice Harding in Chambers, on the 6th instant. His Honor then raised the question of the validity of Mr. Baines' appointment, and stated he had not been officially informed of the appointment, nor was he, as one of the Judges of the Supreme Court, consulted as to the appointment before it was made. His Honor adjourned the summons till to-day, and again adjourned it to-day to be heard before the Full Court, to-morrow.

We give you this information as you might wish to have the question argued; and it is just possible, either of the parties might not feel sufficiently interested in the question to brief Counsel to appear.

We have the honour to be, Sir,
Your obedient servants,
LILLEY & O'SULLIVAN,
Solicitors for the plaintiff.

The following memoranda were indorsed on this letter by the Minister for Justice:—

Why has not this been reported by the registrar, since it arose?—Mr. Baines occupies the position of an additional clerk, whose primary duty is to relieve the registrar of the detailed work of taxation. He does not hold any separate or independent office, and his taxation is subject to reference in respect of disputed items, to the Registrar, from whose decision a review might be applied for.

9/9/89. A. J. T.

The Registrar to inform Mr. Justice Harding accordingly.
A. J. T.

HARDING, J.: That minute is an interference with us. The registrar is not in the habit of reporting matters to the Minister of Justice.

LILLEY, C.J.: The registrar of the Court is a judicial officer here, and is not to report on matters to anyone, except to the Court. The Minister of Justice has no right to ask for a report to him from the registrar. The Minister of Justice is not known in the Court, except when he appears here on behalf of the Crown. In a recent case, when a report was asked for in Parliament, he was told that the judges would not interfere while parties did not object to the records in their matters being examined. I hope there is not a disposition to interfere with Court matters by the Executive. The Crown coming in here comes in as a suitor, and may ask for copies of records relating to matters submitted to the Court by them, but it has no right to make any inquiries in relation to the matters of private suitors. Power for that must be got by statute. I am not aware of any such. They must go to the legislature, and ask for such a statute to be passed by the legislature. The Court stands, as it were, between the Crown and the people, and must exercise its functions independently; and, except as affected by statute, it must be left to act in independence; and no interference must occur, except by statute, or as provided by statute, with the consent of the judges. What is the use of having the judges safe from being assailed by the Executive, if their officers are to be assailed? Nothing is said here by us as to Mr. Baines's personal qualifications.

Lilley submitted that the office of taxing officer was no new office, but was an office always existing, but hitherto discharged by the registrar. This appointment was a severance of that office from the others discharged by him. The expression "taxing officer" had been always used; the master in equity, the prothonotary, and the registrar, all named in *The Supreme Court Act, sec. 39*, all performed the duties of taxing officers. The registrar had discharged the duties of taxing officer all along, in the three divisions of his office. A taxing officer was mentioned in *The Judicature Act*; in the Charter of Justice, as given at p. 10 of *Stephens Supreme Court Practice;* and as shown by the bill of costs at page 207, *idem*. Referred also to Rule

of Court of 26th May, 1863, as given in *Harding's Acts and Orders, No. 1, p. 229.*

HARDING, J.: The taxing officer was and is the registrar. He has not resigned as taxing officer.

Lilley referred to *The Costs Act of 1867, ss. 24 and 27—pp. 225 and 227 of Acts and Orders.*

HARDING, J.: Up to the passing of *The Judicature Act* the registrar had performed the duties of taxing officer, and by that he continued to discharge those duties.

Lilley contended that before *The Judicature Act* there were three different persons. The office existed, and the registrar has been relieved of the duties.

LILLEY, C.J.: The words are "such and so many." If you increase the number of officers by splitting up the duties, how do you get over the words "so many?" You cannot increase the staff of the Supreme Court without consulting the judges; and that is a good thing, for it takes the office out of the range of political jobbery. It shall be guarded by the judges. This is an important matter, and we will deliver a considered judgment. No doubt such an officer is essential; but the question is whether the appointment of an officer of this Court is to be permitted in the teeth of the Act. We certainly will not sanction interference with us by an officer appointed not in accordance with an Act of Parliament.

C. A. V.

At a later hour of the day the judgment of the Court was delivered by—

LILLEY, C.J.: This is a matter of great importance; it is a very serious matter. Consequent upon taxation of costs of suits, parties enter up judgments and issue executions; and executions issued in excess of the authority given by law might cause litigation, and involve parties in considerable loss. My brother Harding was therefore right to refer the matter to us, on the first occasion on which it came before him; and the reference was made none too soon.

Now, by our *Constitution Act, sec. 14*,—

the appointment of all public offices under the Government of the Colony, hereafter to become vacant or to be created, whether such offices be salaried or not, shall be vested in the Governor in Council, with the exception of the appointments of the officers liable to retire from office on political grounds, which appointments shall be vested in the Governor alone.

Then there is a proviso—

Provided always that this enactment shall not extend to minor appointments, which, by Act of the Legislature or by order of the Governor in Council, may be vested in heads of departments or other officers or persons within the colony.

Well, under that the Governor in Council has power, and is, in fact, the proper authority, to appoint to all offices under the Crown, with the exceptions mentioned — minor appointments — where the Legislature has made some other provision, or modified the general authority. The power to appoint in the Governor in Council implies also the power to remove, and, in ordinary cases, an officer who is appointed by the Crown is also removable by the Governor in Council.

Now *The Supreme Court Act of 1867* has modified that general authority. The officers of the Supreme Court are enumerated in *The Supreme Court Act of 1867, sec. 39*, as follows:—

The said Court shall have a master in equity, who shall be a practising barrister of England or Ireland, or advocate of Scotland, of not less than three years' standing, or a practising barrister of New South Wales or Victoria, or of the said Court, not previously admitted in any of the superior Courts of Westminster, Dublin or Edinburgh, of not less than three years' standing, or an attorney-at-law of not less than seven years' standing; and such master in equity, when appointed, shall if required perform the duties and discharge the office of chief commissioner of insolvency; and the said Court shall also have a prothonotary and registrar, and such and so many other officers as to the judge or judges for the time being of the said Court shall appear to be necessary for the administration of justice and the due execution of all the powers and authorities of the said Court.

Then there are certain definitions of the detailed duties of the master in equity, prothonotary and registrar, and the other officers; and then follows this portion of the clause,—

and no new office shall be created in the said Court unless the judge or judges thereof shall certify by writing under his or their hand or hands to the said Governor that such new office is necessary.

Now the master, the prothonotary, and the registrar all discharged under our system of law duties well known; the master in equity in effect

drew up decrees, and performed various other functions, some of *quasi*-judicial character, and he taxed the costs in equity; the prothonotary discharged somewhat similar duties on the common law side of the Court; and the registrar, who was an officer known in equity, had certain duties to discharge, which were of an extensive character in New South Wales and in our system here. He had duties committed to his hands which would have been discharged by these three officers named in this section. The circumstances of the colony and the business of the Court then not warranting separate officers being appointed, the statute made a provision that the functions and duties under each should be discharged and dischargeable by one officer, and the three offices should be all included in the office of registrar, and be discharged by him.

Provided that, until such appointments be made respectively, the registrar and other officers of the Supreme Court as constituted before the passing of this Act shall exercise the like powers and authorities as were by them severally and respectively exercised and discharged in the said Court up to the time of the passing of this Act.

Now up to the time of the passing of this Act the registrar of this Court discharged all the duties of master in equity, prothonotary, registrar and taxing officer, and all these offices, so to speak, were embodied in him up to that time. Then came *The Judicature Act*, which altered almost entirely our system of administration of the law on its practical side—it altered it in its principles to a great extent, but for our purpose now it is necessary only to mention that it altered our practice to a great extent, by making it permissible to try in one suit questions both of equity and common law—and in order to carry out that provision it was necessary to provide for carrying out the duties of the registrar under the Act, and where it was necessary that the duties of an office should be discharged it was provided that it may be carried out by the "proper officer." With reference to that, *The Judicature Act* made this provision, in Order 60, r. 1—"interpretation of terms"—

"Proper officer" shall, unless and until any rule to the contrary is made, mean an officer to be ascertained as follows:—

(*a*)———

This is the only important one—

Where any duty to be discharged under this Act or these Rules is a duty which has heretofore been discharged by any officer, such officer shall continue to be the proper officer to discharge the same.

Well, that continued the system which was in force at the time; the registrar continued to exercise, as he had done before the passing of these Acts—*The Supreme Court Act* and *The Judicature Act*—all the functions of master in equity, prothonotary, and registrar and taxing officer. Then he was one officer, holding one office with varied functions--functions which may be subdivided. Under *The Supreme Court Act* there might have been appointed a master—not a master in equity, as equity had ceased to be separate; there might have been a prothonotary, who might have been called a registrar; and there might have been a second registrar, and a third registrar, as the growing importance of the business of the Court might demand. Or one of them might have been called a taxing officer; but he would be a new officer, and would hold a new office. So far as the interpretation of the statute is concerned, it must be clear beyond any reasonable doubt that if you appoint a new man to discharge functions in the Court, he being an officer in the Court, he is another officer, a second officer. Suppose we recommended a third registrar, or a second registrar and a taxing officer, then there would be "such and so many" officers as the judges deemed necessary for the several functions, and for the discharge of the business of the Court.

Now, it matters not what rank an officer holds in the Supreme Court, whether called a clerk or registrar, if he is lawfully appointed to carry on the administration of justice or the administration of the Court in any way, however humble, he is an officer of the Court subject to the jurisdiction of the Court; all these officers, from the registrar down to the humblest clerk in the office, is subject to the authority of the Court, controlled by it in the discharge of his duties in the Court, and any

interference with them is an interference with the Court itself, and cannot be allowed. The importance of this state of the law can hardly be overestimated. Under our Constitution we have a sharp division—we have the legislature, the executive, and the judiciary. There are well known lines of duty, well known spheres of action, and each of them may and does very properly—I believe, in the main, very well,—speaking at any rate for those who are not ourselves, discharge those duties which our countrymen have placed in their hands; and it is of great importance to maintain these lines and divisions. It can never be in the interests of the community, and never has been understood to be in the best interests of the country, that there should be a confusion of these functions. The legislature is not, except by Act of Parliament, entrusted with the interpretation or administration of the statutes which they pass,—there is a strong and essential line of division; and the judges, and through them their officers, are practically independent as long as they faithfully discharge their duties. If the independence of the officers of the Court can be interfered with, if they can be withdrawn from the control of the judges, and strangers can be foisted into the offices of the Court, the independence of the judges would be at an end; and by carrying out the behests of the political executive other than the judges, the officers of the Court might become a political engine of injustice. I do not presume that there is danger now that that would happen, but in administering the law we must look with anxiety at the possible consequences of an invasion of the authority which has been given into our hands, or of any departure from the strict line of duty and authority, which has been placed in the hands of the several branches of the State. As to the functions of the legislature, we do not interfere with them; nor with those which the Executive Council has to exercise. When the legislature has expressed what is the law, we administer it; when a duty is put into our hands, we will exercise it loyally, but we will exercise it against any one of these three divisions of the State, if found to overstep or violate its authority. No one branch of the legislature has power to overstep its authority. It has been said that some authority had been on one occasion exercised over the registrar of the Supreme Court in another Colony; the registrar had been required to do something which the judges held to be inexpedient. He received an order from a Government department to do it; he was afraid to disobey the judges, and the executive dismissed him. That, in our judgment, was a very gross abuse of authority. I hear that statement from the Bar, and I believe it has been correctly stated. If that were carried out here, in this Colony, if such coercion were used over one of our officers, I should consider it a corrupt abuse of authority, and it would be in the interests of the community, to see through the legislature that the executive hand was restrained from a repetition of such an abuse.

Here, then, I say, are these divisions. It is in the interests of the country that they should exist. The Crown itself only comes into this Court as a suitor; it can come in here and inspect all records concerning it as a suitor, but as far as private persons are concerned, it has no more right than a private individual to overhaul the records in relation to private suitors. It would lead to great abuse if that could be done, and it cannot be done, unless our officers fail in their duty, without the order of a judge of this Court. The reason then for the protection which the legislature has thrown over the officers of the Court in *The Constitution* and *Supreme Court Acts*, is perfectly clear; the reason why the recommendation of the judges is first required, is that their independence may be maintained. Therefore both the law and the reason for the law harmonise and are clear; and in holding what we do hold in this matter we obey the law, and create no new authority in ourselves.

Now to come to the individual matter,—and in what I say it must be distinctly understood that I throw no reflection whatever on the gentleman who has been appointed to this office. I may know him, though I am not aware of the fact; really I

do not know him. No reflection is cast upon him; he may exercise the duties of this office with perfect ability, honesty and fidelity. That may be all well; but at least I may say here, that to fill that office a man of superior attainments is required. It is a very important office; we have only to look at the duties which are discharged by the officer filling it to see how important it is, and to see what his office really is. He has placed before him bills of costs in every form of procedure in this Court. He has two duties in connection with those bills; first, he is to see that no unnecessary proceedings have been taken; he is a judge of that, subject to the review of the judges. Then he has also to see that the charges for the proceedings taken are not excessive. So important has the business of this Court become, and so great, that he passes bills through his hands, involving expenditure by persons in the community, amounting to many thousands of pounds a year. He may be subject through his duties to improper influence being brought to bear upon him. He must have a wide range of knowledge of the practice of the law. His character must be of the highest: it should be as that of one of the judges himself; he should not be above corruption only, but beyond the suspicion of corruption; and he should be selected with a view to all these qualifications, and, I would add my opinion, that, to keep him in that position, he should be a man paid an ample salary. This is an important appointment—an appointment of very great importance—when we regard it in the interests of the people who come into this Court as suitors. Mention of a salary of £400 has been made. In these days no man from whom we would require the qualifications I described would be likely to take this appointment without great remuneration; I should hardly imagine a man possessing the attainments I have described would be found to accept the office at so low a rate of remuneration as the amount mentioned in the letter of the Minister of Justice. We at least would expect that he would have given proof of his attainments by having found his way on the roll of the Court as a solicitor or barrister.

Then the legislature having required that the recommendation or approval of the judges of the creation of this office should precede the appointment, it was the duty of the officers of the Crown, before they had made such an appointment to have come to the judges. With regard to the necessity of such appointment in the present state of the business of the Court, we are agreed, and the judges would have given every possible help, as far as their sanction was required, for the creation of this new office.

We hold that as this was a separation from the office of registrar, as it was a new office, the recommendation or approval of the judges should have preceded the creation of the new office. Now, nothing was known to the judges of the creation of this office, until a bill of costs came before my brother Harding at Chambers. I believe the first intimation to us of this appointment was by rumour outside; but the first official knowledge I had of it was the information from my brother Harding that a bill had been submitted to him for review of the taxation by this gentleman.

So long as the law is in the condition it is in, we are resolved to maintain it in its integrity, and see that there is no intrusion upon the tribunal, to which the country has committed the administration of justice, by persons who have no authority by law to intrude themselves within our offices. If the executive having power to appoint and remove, can also coerce one of our officers to do what the judges have told him not to do, there would be an unseemly conflict of authority between the Court and the executive, and the Court, until the legislature take it away, has ample power to vindicate its authority and position. If the executive chose to discharge one of our officers, as we are told was done in another Colony, why then they could do it. That would not intimidate the judges. If the executive appointed another man, and he was found to be incompetent or corrupt, we would suspend his functions. So the authority of the Court is ample, and the better way would be to avoid a conflict of authority, which is totally unnecessary, if reasonable persons are engaged on

either side. Such a conflict of authority would be deplorable and highly mischievous to the administration of justice.

This is the first intimation of the appointment, and it is conveyed to the registrar in this way:—

The Crown Law Offices,
Brisbane, 5th August, 1889.

SIR,—I have the honour to inform you, that Mr. James Edward Baines has been appointed taxing officer in the office of the registrar of the Supreme Court, at a salary of four hundred pounds per annum.

The public notification of this appointment, which takes effect from the 1st August, will appear in the *Gazette* of Saturday next.

I have the honour to be, Sir,
Your obedient servant,
WM. CAHILL, Sec., C.L.O.

The Registrar, Supreme Court, Brisbane.

The Minister was clearly aware of the condition of the law. I do not suppose it was an intentional evasion of the authority of the Court in this matter, it probably was inadvertent. Having appointed an officer himself, he appears to try to escape by a curious way, by minute on a letter from Messrs Lilley and O'Sullivan, solicitors for the plaintiff in this matter, stating the circumstances on which my brother Harding had raised the question of this appointment.

Why has not this matter been reported by the Registrar since it arose?

Now, that is an assumption that we do not admit for a moment, that our officer can discharge his functions subject to a report to the Minister of Justice and to his approval or censure. The Minister of Justice and others must keep their hands off the officers of the Court. There is authority to make them, if they will not otherwise do so. I hope there is no need to vindicate the authority of the Court; if need be, it will be done. Our officers are not to report to Ministers on their duties. The registrar is *quasi*-judicial in his functions; to what end is he to report to the Minister of Justice, and is the Minister to control him? Another offensive matter here, if intentional—he had been informed that His Honor Mr. Justice Harding had adjourned this matter to another day, and again to the Full Court, and his question is most offensive from this point of view; it is a demand for a report from the registrar on the action of a judge of this Court. I think the Minister of Justice can hardly have understood what he was about. If we were informed that he had done it wilfully, we would possibly have to take action in the matter. However, he probably will not interfere with the duties of or the discharge of them by the registrar, or of any other officer. Our officers will discharge their duties on their responsibility to us; we have always been able to get the duties of our officers discharged by them. Again, the Minister writes—

Mr. Baines occupies the position of additional clerk, whose primary duty is to relieve the Registrar of the work of taxing costs.

Then the Minister of Justice assumes to relieve the registrar of duties which have been imposed upon him by law and by the judges; and the Minister who appointed Mr. Baines a taxing officer now calls him an additional clerk. This is an attempt, but not a very fortunate one, to retreat from an untenable position. A so-called taxing officer has been appointed irregularly and illegally. So far as he has exercised functions, taxed bills, and so forth, his acts are void. This particular act is void. The remedy, of course, is for the Crown to obey the law.

HARDING, J.: That is the conclusion I arrived at in Chambers, and I intimated it, and it was brought here at my suggestion, that a matter of such weight should receive the decision of the Supreme Court, whether the parties required it or not.

CHUBB, A. J.: The judgment of The Chief Justice is concurred in by myself as the judgment of the Court.

Solicitors for plaintiff: *Lilley & O'Sullivan.*

IN INSOLVENCY.

HARDING, J. 18th September, 1889.

Re CHONG KEE.

Practice—Insolvency—Examination of witnesses—Adjournment—Right to cross-examine—Insolvency Act of 1874 (38 Vict., No 5), s. 114.

Counsel for an insolvent cannot examine witnesses by way of cross-examination, but may examine with the object of clearing up any matter which has been left obscure in the examination.

Held, also, that a witness cannot be cross-examined by his own counsel.

An order had been made for the examination of witnesses, subject to the usual proviso as to adjournments. *(Harding & Macpherson, 70.)* The examination was held, and the trustee reported to the Judge, that after the examination had lasted two hours, the trustee objected to counsel for the insolvent cross-examining the witnesses. An adjournment was then granted to obtain the opinion of the Judge on the question.

Powers for the trustee, applied for advice as above.

Harding, J.: I held the other day, (*In re James Simpson, ante p. 161*) that counsel appearing for a witness, had no *locus standi*; and consequently, could not cross-examine his witness; but in the present case, the question is whether counsel for the insolvent, can cross-examine witnesses as a matter of right. I am of opinion that he cannot by way of cross-examination, but he may examine with the object of clearing up any matter which has been left obscure in the examination.

Solicitors for the trustee: *Morton & Powers.*

IN CHAMBERS.

Harding J. 23rd September, 1889.

FORREST *v.* GRAY.

Costs—Taxation—Review—Allocatur—Higher or Lower Scale — Rescission — Estoppel — Retainer—Settlement of Pleadings—Additional Rules 13, 26.

A verdict for plaintiff having been given in an action for rescission, on a summons to review taxation on behalf of plaintiff, it was objected that the higher scale of fees was applicable.

Held, without considering the nature of the agreement, that the plaintiff's solicitor having filed a certificate stating the lower scale to be applicable, the plaintiff was estopped from applying for the higher scale.

Harrison v. *Leutner*, 24 Ch.D., 596, distinguished.

Held. also, that under the circumstances of the case, one special retainer fee and its costs should be allowed on taxation, as costs between party and party.

Held, also, that fees for settlement of statement of claim by senior counsel in consultation be disallowed, also for copy of documents for a commission.

The taxing officer must make his allocatur before a review can take place.

Summons to review taxation.

An action had been brought for the rescission of a contract for some shares, and the delivery up of certain promissory notes; a verdict was given for the plaintiff; costs were taxed. The plaintiff then applied for a review of the taxation, and objected (1) that the contract being for rescission costs ought to have been allowed on the higher and not the lower scale; (2) that the plaintiff ought to have been allowed fees for one special retainer, and its costs; (3) that fees for settlement of statement of claim by senior counsel in consultation were disallowed; (4) that costs of documents used on a commission, on behalf of both parties, for the examination of witnesses were disallowed; (5) that the registrar disallowed to the commissioner, eleven guineas, and his clerk, one guinea, in addition to eight guineas allowed.

Byrnes, for plaintiff: This was an action for the rescission of a contract and delivery of promissory notes. We now ask for a review of the taxation of the plaintiff's costs. The objections are in a schedule annexed to the summons.

Harding, J.: There is no allocatur on the bill of costs. There is some handwriting, but no signature. Before review there must be an allocatur. *Chitty Forms*, 41; *Cleaver* v. *Hargrave*, 2 Dowl. P.C., 689; *Sellman* v. *Boorn*, 8 M. & W., 552; *Marshall's Costs*, 330.

The Registrar then appeared, and stated he had taxed the Bill, but had omitted to add his usual note of taxation, which he had intended to do after reviewing the objections.

The usual note was then added.

Byrnes: With regard to the first objection, we contend that the higher scale of costs is applicable. The action was for rescission. *Order IV. r. 2,* Additional Rules, Solicitors' costs (*A. & O., 723*), mentions the cases in which the higher scale is applicable, and concludes with the words, "and in

all cases, other than those to which the fees in the column headed 'lower scale,' are hereby made applicable." Appendix A., part II., in the schedule of the *Judicature Act*, sections 2, 4, 6, contains cases where the lower scale applies; section 2, is for money claims; section 4, for damages; section 6, special endorsements. This claim is for rescission of an agreement, and for delivery of promissory notes. The action could have been brought in no other form.

HARDING, J.: What scale did you certify for?

Byrnes: For the lower, but that does not debar us from taxing on the higher. *Harrison* v. *Leutner*, 24 Ch.D., 594.

HARDING, J.: *Flockton* v. *Peake*, 4 N.R., 456, is against you. At the hearing the Court might form a different opinion, as there is a discretion then; after judgment it is a question of construction.

Feez, for the defendant, submitted that the plaintiff was bound by the certificate for the lower scale. The successful party is the plaintiff; he did not apply for the higher scale at the trial. The higher scale should have been stated in the decree. This really was an action for the return of the promissory notes, and is included in cases for the lower scale.

Byrnes: *Harrison* v. *Leutner* is applicable. This is an appeal from the discretion of the Registrar, who held the lower scale applicable.

HARDING, J.: I think that the plaintiff is estopped by his certificate; that the lower scale is applicable, inasmuch as thereby it was rendered unnecessary for the defendant to apply at the time for an exercise of the Judge's discretion, the plaintiff having already stated that the lower scale was applicable. I express no opinion as to which scale might have applied had not this been the case. I decide entirely on the ground of estoppel. Taxation supported.

Byrnes: As to the second objection, the Registrar has disallowed the fees for one special retainer, and its costs. The plaintiff is entitled to them. *The Neœra*, 5 P.D., 118.

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Feez, referred to *Morgan & Wurtzburg*, 494, and the cases there cited. These should be costs between attorney and client.

HARDING, J.: The whole law of retainers is explained in *ex parte Lloyd*, *Montague*, 70, *note*.

The Registrar stated that retainers had always been allowed till very recently. Up till then, the practice was to allow them till they were objected to, and if the objection was pressed, to disallow them.

Byrnes: Till recently, it was the practice to allow retainers here; the practice in England is conflicting. In *G. O. XXXIX., r. 17 (A. & O., 731)*, the word "retain" is used, and the necessity for such costs is in the discretion of the Registrar.

HARDING, J.: Review allowed. The interests involved in this case were large, and questions of fraud raised. Had not the counsel been retained, great risk of loss would have been incurred by his client, in the event of the opposite side retaining him and insisting on having his services. In ordinary cases, possibly under *Additional Rules*, r. 26, the retainer of counsel may be deemed an over-caution within that rule. It is within the discretion of the Registrar, but as he states, he exercised no discretion, and acted only on the text of *Morgan & Wurtzburg*, as applying to all cases, I think it right to exercise the discretion, and order a review in this case.

Byrnes: The third objection is, that the fees for the settlement of the statement of claim by senior counsel in consultation, were disallowed. *Special Allowances*, R. 13 (A. & O., 731). The Registrar says he has no discretion to allow a settlement of a pleading after it has been once drawn, and refused to consider the matter, and disallowed it.

HARDING, J.: I think the registrar has a discretion, see Rules 13, 26, but as the course he has taken is in its result such as it should have been, inasmuch as I think that this was not a sufficiently difficult case to require a senior's assistance, I do not send it back to him. R. 26 is explicit. Such costs are only to be allowed as appears to the registrar necessary or proper for the attainment

of justice. In an extremely difficult case, such costs might be allowed, but I should think the occurrence of such cases would be very rare. Should Mr. Byrnes have been mistaken, and should the Registrar have given a decision, and exercised his discretion, disallowing the costs, I think his decision right, so that in neither case will there be any necessity for a review. Taxation supported.

Byrnes: The fourth objection is, that the Registrar has disallowed the costs of documents used on commission, on behalf of both parties, for examination of witnesses, e.g. pleadings, statement of plaintiff's case, &c.

Feez: Copies have been already allowed for on taxation in instructions for brief.

HARDING, J.: Taxation supported. The registrar has exercised his discretion and has allowed an enormous sum, £100, for instructions for brief; this is not a matter before me, but it is quite possible that therein is included something on this account, as is stated by Mr. Feez. I see no reason to interfere with the taxation.

Byrnes: The fifth objection is, that the Registrar disallowed to the commissioner, eleven guineas, and his clerk, one guinea, which he should have allowed, in addition to eight guineas allowed, and three guineas to the clerk.

HARDING, J.: Taxation supported. So far as the facts show, the registrar's taxation is fair.

Feez applied for costs.

Byrnes objected. Plaintiff has succeeded on the second objection, and in principle on the first.

Order: Allow the defendant the costs of this application, except so much as was caused by their opposition to the second item.

Solicitors for plaintiff: *Thynne & Goertz.*

Solicitors for defendant: *Hart & Flower.*

IN CHAMBERS.

HARDING, J. 9th and 27th September, 1889.

HICKSON *v.* HICKSON.

Practice—Probate—Affidavit to lead citation—Order V., r. 6—Order LVIII, rr. 1 and 2—Nullity and irregularity—Costs.

A writ of summons for a probate action issued before affidavit, filed in accordance with O. V. r. 6, is an irregularity, if not a nullity; but relief will be given to the defaulting party under O. LVIII., rr. 1 and 2, on payment of costs of application and occasioned by amendment.

Where a writ has been issued by a local commissioner, and the writ has not arrived at the office of the Supreme Court, the time for entering an appearance is extended until its arrival.

SUMMONS to set aside a writ of summons in a probate action, on the ground of irregularity, with costs and stay of proceedings.

Wilson. for defendant, applied as per summons, on the ground that the necessary affidavit had not been filed as required by Order V., r. 6. The filing of the affidavit is a condition precedent to the issue of the writ, and consequently, the writ is null. *Re Chamberlain, 1 P. & D., 318; Coote, 228; Brown on Probate, 351-352.*

Bernays for plaintiff: The summons is not issued in time. *1 Chitty's Practice, 236; 2 Chitty, 1195;* as to nullity, *Chitty, 1193.*

Wilson: As the writ was not here, we could not appear.

The application was then adjourned till the Chamber day after the arrival of the writ from the local commissioner, and the question of costs was reserved.

On the arrival of the writ:

Wilson renewed the application.

Feez for the plaintiff: This is similar to an application under *Order XVII., r. 2,* for joinder with an action for recovery of land. *Mulkern v. Doerks,* 51 L.T., 429. No harm has been done to the defendants. This is an irregularity, not a case of nullity. Ample power is given under *Order LVIII, r.r. 1 & 2,* for relief. *Dawson v. Beeson,* 22 Ch. D., 504, 509; *Tyler v. Green, 3 Dowl, 439; Child v. Marsh, 6 Dowl, 576,* were cited. The defendant should have taken this summons out before the time limited for appearance had expired.

Wilson submitted the defendant was within a reasonable time. G. O., 26th May, 1863, (*Harding A. & O., 527*). In *North* v. *Holmes,* cor. H. J., 15th March, 1889, a judgment was set aside, the

writ having been issued by a local commissioner, and not arrived when the defendant went to enter an appearance.

HARDING, J.: It appears to me that the effect of my previous decisions is that until the writ is down, there is no necessity for appearance; in other words, the defendant has until that time to enter an appearance. I think this is a case of nullity, certainly of irregularity. If nullity, its fate would be application granted with costs, and it might be the same if irregularity. In any case, the defendant would get his costs. I intend to give the plaintiff the benefit of *O. LVIII., rr. 1 and 2*, and thereby, by giving the plaintiff leave to amend, save the benefit to him of the prior proceedings. Under these circumstances, I do not think the plaintiff should obtain better terms than if the defendant's application was granted.

Order: Direct the non-compliance with *O. V., r. 6*, being the omission to file the affidavit in verification of the indorsement on the writ before its issue not to render the proceedings in the action void. Allow the plaintiff to amend his writ and proceedings as he may be advised. Let the plaintiff pay the defendant the costs of this application and occasioned by the amendment.

Solicitors for plaintiff: *Bernays & Osborne.*

Solicitor for defendant: *Bunton.*

HARDING, J. 27th September, 1889.

WILLIAMS AND OTHERS *v.* PAIN AND OTHERS.

Will—Execution—Probate in solemn form—Attestation—31 Vict., No. 24, s. 39—Meaning of term "subscribe."

A testator executed an instrument purporting to be a will on seven sheets of paper, signed each sheet, and subscribed his name at the end thereof. Two witnesses were present, and after the testator had signed the will, they attested the first six sheets only, and not the last.

Held, on evidence being adduced, that the witnesses signed the six sheets with the intention of verifying the signature at the end of the will as well as on the other sheets, that probate might be granted in solemn form.

ACTION for probate in solemn form.

Fitzgerald, for plaintiffs: This is an action for probate in solemn form, of the will of Thomas Pain, who executed an instrument on seven sheets of paper, each sheet being signed by the testator, and also, by two witnesses present at the same time, with the exception of the seventh sheet. The witnesses bring evidence of their intention of attesting the will in signing the six sheets, and it is submitted they have a right to do so. *Roberts v. Philips, 4 Ell. & Bl., 450;* and the remarks of Lord Campbell, *ibid* 457.

HARDING, J; That is before the *Wills Act;* now it is required to be subscribed at the foot or end thereof.

Fitzgerald: There is no mention in that statute as to where the attestation is to take place; as long as a testator has signed at the end, and the witnesses attested, the will is valid. *In the Goods of Chamley, 1 Rob. Eccles., 757.* Several cases apparently opposed to this are distinguishable, as no extrinsic evidence was adduced to shew the intention of the witnesses.

HARDING, J.: There must be knowledge coupled with intention. The last signature is the important one. If the witnesses saw the last signature made and acknowledged in their presence, and they then signed it with the intention of attesting, the will would be valid.

Fitzgerald: There was but one intention; the witnesses had a general intention to attest, and by some oversight the last sheet was overlooked. They saw the final signature.

HARDING, J.: Then they meant to give validity to a signature on the seventh sheet by affixing their signatures on the six sheets for identification.

Wilson for the defendants: Apart from the legal question, the defendants by their guardians are satisfied that the proof brought forward by the plaintiffs shew, that the document in question was intended to be the will of the testator. The guardian is the uncle of the defendants. It is for the benefit of the children, who are the next of kin, that the will should be established. The plaintiffs are the executors of the alleged will, and the wife is one of the plaintiffs. The guardian is

prepared to submit to the order of the Court For the assistance of the Court. *Randfield v. Randfield, 30 L.J., Ch., 180, note*, was cited. By the term "subscribe" is not necessarily meant signed under or at the end. The distinguishing fact in this case is, that the testator signed before the witnesses commenced attesting. *Ewen v. Franklin, D. & Sw. 7; Re Pearse, L.R., 1 P. & D., 382; In the goods of Dilkes, 3 P. & D., 164;* are distinguishable.

HARDING, J.: The questions raised in this action are whether (1) the will was executed according to the provisions of *31 Vict., No. 24*, and (2) whether the instrument was signed in the presence of two witnesses who subscribed the will in his presence, at his request, and in the presence of each other. The will is on seven sheets of paper, the six first sheets are signed—Thomas Pain, testator, and A. M. Doyle and A. Spencer, with the word witnesses. On the seventh sheet Thomas Pain has signed his name at the side of the usual attestation clause, but the names of the witnesses are wanting. Under these circumstances, the above issues are raised.

Affidavits of the two witnesses were read; both state that Pain executed the will by signing a seventh sheet and six preceding ones in their presence, and that then and there, Pain declared the signature as his, and that at his request, and in his presence, and in the presence of each other, they attested the first six sheets.

Thomas Pain did all that was necessary for a valid will. He signed seven sheets in the presence of the witnesses, and acknowledged his signature in their presence. No form of attestation is required. The mere signature of the testator and two witnesses under the circumstances required, is enough, if an affidavit of these facts is made. On the authorities cited, the attestation need not be on any particular sheet. The document is signed at the end, the witnesses attested it, and they swear they signed it with the intention of verifying the signature at the end as well as on the six sheets. I find both issues in favour of the plaintiffs. There will be judgment for probate in solemn form, on the usual formal proofs being produced to the Registrar. Costs of both parties out of the estate.

Solicitors for the plaintiffs: *Macdonald-Paterson & Co.*

Solicitor for defendant: *Bunton.*

OCTOBER SITTINGS OF THE FULL COURT.

IN THE MATTER OF *The Trustees Act of 1889*, AND IN THE MATTER OF THE WILL OF R. B. RIDLER, DECEASED.

Trustees Act of 1889, sects. 9 and 10—Passing of Trustee's Accounts—Commission.

Sects. 9 and 10 of the *Trustees Act of 1889*, do not authorise the Court or a Judge to order trustees to file and pass their accounts, but if trustees apply to the Court to fix the amount of their remuneration for the management of the estate, the Court can then require the trustees to produce their accounts, in order that it may judge what pains and trouble have been taken in such management.

It is entirely in the discretion of the Court or a Judge whether the trustees have their costs out of the estate.

Lilley, for the trustees under the will, applied for an order authorising them to pass their accounts and to apply for commission on the passing thereof, in the manner heretofore followed in the case of executors' accounts. This matter was referred to the Court by Mr. Justice Harding.

HARDING, J.: Yes; that is what I was asked to do. I looked at the Act and said I saw no authority there for me to authorise the trustees to pass their accounts.

LILLEY, C. J.: In this case I think that the 9th and 10th sections of the Act do not authorise the Court generally to order trustees to produce and pass accounts, but the sections I think, authorise the Court, or a judge, conditionally to require the trustee to produce and pass his accounts, if he is a trustee seeking remuneration; that is, the judge may say, "you come here and ask for commission in respect of your pains and trouble in the management of this estate. I cannot possibly tell what pains and trouble you have taken, unless you show me by accounts what you have done in the management of the estate." Well, then, if the trustee should fail to comply with that condition.

4 Q.L.J. 54

the judge could say, "you can have no remuneration." This being a matter in the discretion of the judge, until we can make rules, the mode of managing the business may be left to the individual discretion of the judge. It is better for all that the practice should be the same for all the judges. On the first application of the kind made to me, I thought it more convenient and better to follow the practice followed in the Court from its foundation in the case of executors' accounts.

I am free to say that another judge might think it more convenient to do it in another way, just as my brother Harding did before the passing of these two sections. He did not think it necessary to ask the trustee to produce and pass his accounts, but said, "you can take so much for your pains and trouble." I would not pass, and refused to give remuneration, until I could say what trouble they had taken, and, as I had not power under the statute then to act, I refused absolutely to do so. Therefore, *In the estate of Mary Peattie*, in which an application was made to me, it seemed to me, as in so large an estate 5 per cent. commission would be a large sum, that I should see the accounts, and fix the sum and amount of commission. I have ordered the accounts to be passed; when they are passed and application is made to me for commission, I may order some sum not exceeding 5 per cent.

I think this question was properly referred, because it seems to have been insisted that the judges had power to compel trustees to pass their accounts, which I do not think is the correct view of the law.

HARDING, J.: I have very few words to add to what my brother has said on the matter. I can hardly conceive the Legislature, desiring to give the judges power to have the accounts of trustees laid before them, doing it by such a roundabout way as to enact that, in effect, "if you do not pass your accounts, I won't consider whether you should have your commission." I think an Act, by which it is intended to take out of one subject's pocket money to be put in another subject's pocket, should speak out in plain and decisive language, and, if the Legislature intend trustees' accounts to be passed, it should have given in direct words power to the judges to do it. I do not see any power, except in a roundabout way, to say, "if you don't do so and so, you won't get commission." Again, I cannot help anticipating the enormous costs to which estates will be put, if this Act is used to any large extent, by the many trustees appointed every year. To obtain their commissions each of these trustees will be entitled to pass his accounts,—a proceeding not known to the law at present,—and in order to do that, there will be various applications of a most expensive character, and which in the end will not benefit the estate one *iota*. The only benefit will be that the trustees will be able to put, in some cases, pounds, in other cases, thousands of pounds, into their pockets, and the only way to get it will be out of the funds left, in some cases, for a distressed family. Take an estate of £50 a year, with a trustee filing his accounts twice a year, which will cost about £12 each half year, in order to get a commission of £2 10s. This is legalised, and it seems to me that the Legislature did not intend to legalise such a tremendous laying hold of the funds of one person by another.

I can get no power out of the Act, except in the roundabout way in which The Chief Justice has suggested. To give the Court power in that way is not good, nor is it the way in which Acts of Parliament appeared in the past. It has a tendency to make the Court appear absurd. The power should be conferred by Acts which are clear and understandable.

LILLEY, C. J.: I think, for my own part, although I see many difficulties, as pointed out by my brother Harding, it would have been better had the Legislature taken a more direct course and handed over to the Supreme Court a check over all trustees, as over executors; but they have not done that, and the sections have clearly been framed merely for the purpose of getting trustees their remuneration. If there should be any abuse of it, by constantly coming here to get commission at a great cost in small estates, the Court will take

a course to check such a practice. It is entirely in the discretion of the judges, or of the Court, whether the trustees have their costs out of the estate.

Solicitors for trustees: *Rüthning & Byram.*

IN INSOLVENCY.

LILLEY, C.J. 7th and 16th October, 1889.

In re ANTHON JULIUS STENDRUP, AN INSOLVENT.

Liquidation—Sec. 107, Insolvency Act of 1874—Fraudulent Preference—Knowledge by Creditor.

Before instituting proceedings for liquidation by arrangement, S. sold his stock and business privately to H., and received payment in cash in the presence of B., who demanded the money in satisfaction of a debt of S. to his firm Y. & Co. B. knew that S. was embarrassed, and that besides this sum paid for his stock, he had no other assets than book debts. S. paid the cheque to B. Upon the trustee moving for an order on Y. & Co. for payment of the money to him,

Held, that, as B. knew of S.'s embarrassed circumstances, the payment was a fraudulent preference; and was not in the customary course of business, because B. knew S. was selling off all his stock.

Butcher v. *Stead*, L.R., 7 E. & I. App., 852, followed.

MOTION, on behalf of the trustee of the liquidating debtor's estate, for an order upon Young & Co., creditors, for payment to him of £420 6s., the amount of a cheque paid by insolvent to them shortly before filing his petition, in satisfaction of a debt to them, on the ground that the payment was a fraudulent preference.

Rutledge appeared for the trustee, in support of the motion; *Lilley* for the respondants, Young & Co., to oppose.

The circumstances appear in the argument and judgment.

Rutledge: Bartholomew when demanding and receiving the cheque from Stendrup, knew that he was in debt to other firms. He asked for it on the ground that Young & Co. were the largest creditors; and told him that he could pay the other creditors out of his book debts. He knew the debtor was selling all his stock. There was therefore, want of *bonâ fides*. The payment was a fraudulent preference and was not in the customary course of business.

Lilley showed cause, and referred to *ex parte Butcher*, L.R., 7 E. & I. App., 839, and to *Bankruptcy Act of 1869*, (Eng.) sect 92. Bartholomew had no knowledge that it was a fraudulent preference. He was not conscious of the debtor's inability to pay all his creditors; therefore, he did not partake of the fraud:—*Ex parte Kevan*, L.R., 9 Ch. App., 754.

Rutledge: The Creditor knew the debtor had dishonoured his own bills, and that others' bills were coming due.

C.A.V.

LILLEY, C.J., delivered judgment as follows, on 16th October:—

IN this case the trustee has moved the Court for an order upon Young & Co., creditors in the estate, for payment of £420 6s., on grounds stated in certain affidavits.

The facts are very simple. It appears that Stendrup at a certain period was indebted to Young & Co. more largely than to other creditors to whom he was at the same time indebted. For some reason or other—most probably with the view of getting further credit—he prepared a statement of his affairs. In that statement he showed that his assets were at all events equal to 20s. in the £1 upon his liability; but there can be no doubt that at that time, and subsequently, when he made a sale of the whole of his stock, he was in embarrassed circumstances; that, in fact, at the time he made the sale of his stock—which is the important matter here—he was in view of law insolvent, because Young & Co. held his dishonoured promissory notes at that time. Upon his obligation to Young & Co. to meet his current liability he was insolvent in view of law—that is, he was unable to meet his engagements, by paying in cash as they became due 20s. in the £1. At the critical point of time he was clearly insolvent, embarrassed, unable to meet his engagements. Being in that condition, he had his stock taken and valued in the presence of Bartholomew. Upon that valuation a private sale was made to Henderson.

In addition to other embarrassments, there was a distress in for rent. On the private sale to Henderson, a cheque was filled up for the purchase money, and it was handed to the insolvent in the presence of Bartholomew, whereupon Bartholomew requested insolvent to hand it to him, alleging that, because Young & Co. were the largest creditors, he ought to pay them first. That was a preference, because insolvent handed that cheque to Bartholomew for Young & Co., and I suppose they have since cashed it, and got the money.

The question has been raised whether, under sec. 107 of *The Insolvency Act of 1874*, that was a *bonâ fide* payment for valuable consideration. What the meaning of those words "for valuable consideration" may be—whether the interpretation put on them by Lord Selborne in *Butcher v. Stead*, L.R., 7 E. & I. App., 852, is the true one—is not material. As it was not accepted by the House of Lords, we may take it that it is not law, though it seems a reasonable construction, that at the time there was a consideration, or something that might be so considered. However reasonable it may appear, it is not accepted as law. It seems to me that Lord Chancellor Cairns's construction ought to have been accepted. The question is, Was it a *bonâ fide*, or was it really a fraudulent, preference? It was a preference, that is clear, by a man in embarrassed circumstances to the knowledge of the creditor who accepted payment. In that case the creditor must have known that the debtor was making him a payment which he should not have made. In our law—in bankruptcy law throughout the British dominions—he should have made equal payments *pro rata* to all his creditors. As he was not doing that, and as the creditor knew he was not doing that, I think it must be held to be a preference violating the policy of the law—that is, it should be held to be a fraudulent preference.

Lord Chancellor Cairns defines the words "in good faith" in the statute as—

> giving a protection, where it is obviously much required, to those who, in good faith, take money that ought to be paid to them, without notice that the person paying is doing anything injurious to his other creditors.

Here it was clearly injurious to the other creditors, because we have it in evidence that not only he knew the insolvent was embarrassed,—not able to meet his legal engagements, as they became due, with payments of 20s. in the £1,—but knew that the only resource he was leaving the other creditors was the book debts, that he was taking away a certain solid sum of money, the value of the stock, and was leaving the other creditors the precarious chance of getting their debts paid out of the debts due to insolvent, at the hazard of their being good, bad or doubtful, with the risk too of having to go to considerable expense to recover those debts, and, instead of having a fund for their debts, of having to add very largely, in the form of costs of litigation, to the debts the insolvent already owed them. So that it can be hardly said that Young & Co., or Bartholomew, who represented them, took that money without knowing that the insolvent was doing something injurious to his other creditors. Lord Hatherley says in the same case—

> I think the legislature intended to say that if you, the debtor, for the purpose of evading the operation of the bankruptcy laws, and in order to give a fraudulent preference, make this payment or this charge, it shall be wholly done away with, except in cases where the person you have so favoured is wholly ignorant of your intention to favour him, and receives payment simply for valuable consideration, and *bonâ fide*—that is, without any notice of any intention on your part fraudulently to favour one creditor above another.
>
> I take the words "in good faith and for valuable consideration" to mean this: It might be that either a voluntary bond for a payment, or some other voluntary instrument, might have been given by a debtor, if he was willing to favour a relative or any other individual; but, in order that the favoured individual to whom he had given such a bond, or made a payment, should be exempted from the previous part of the section, he must have received it *bonâ fide*—that is, he must not be conscious himself of an intention to favour one creditor above another, and he must further have given "valuable consideration" for it.

Well, here Bartholomew asked for this payment especially on the ground of favour, as they had given indulgence and credit more than the other creditors. That does not do away with the fact that he knew, that he was not wholly ignorant of the intention of the debtor to favour him. On the contrary, he was asking for it on the special

ground of favour from the insolvent. Says the same judge—

That will entitle him to hold that payment so made to him in preference, he himself not being a guilty party—I mean not being conscious of a preference being intended to be given to him.

He could hardly say he was not conscious of that, and he can hardly claim to hold, with that consciousness, that favour from the insolvent to the prejudice of the other creditors. Bartholomew was agent for Young & Co., and they are affected by all his acts and his knowledge. Then Lord O'Hagan says—

The creditor so preferred had a *bonâ fide* claim against the debtor, *had no notice or knowledge of the circumstances*, and, in receiving payment of the debt, acted in perfect good faith.

Then, again, he says—

But, on the other hand, it is said, with equal force, that reason and justice warrant protection to a trader who is paid his debt, *in the customary course of business*, by the man who owes it, and with whose embarrassments he is wholly unacquainted.

Independent of that, and his knowledge of the insolvent's embarrassments, Bartholomew knew this was not in the course of business, because he knew the insolvent was selling off all his stock. That a man had a debt or claim against him, and was selling off all his stock, would be a circumstance of suspicion; and the creditor would naturally seek to recover his debt. If the debtor had done so without indicating that he was a man in embarrassed circumstances and an insolvent, the fact that the creditor knew insolvent was selling his business by private sale, that there was no other fund except his book debts, must have brought to the mind of a man with knowledge of business that his debtor was giving him that which he ought to have reserved, and put into the general fund for the payment of his creditors, so far as it would go. It might have gone to pay them 20s. in the £1, for all I know; but that was his clear duty.

Then Lord Selborne lays down the old and very well known principle, that has been laid down in this Court, I should say, hundreds of times—the principle of bankruptcy is the principle of equal distribution. That is the general policy of bankruptcy law, which, before our specific statutory enactments to the same effect, was held to be the principle in bankruptcy. It is the object of the bankruptcy law, even apart from special statutory enactment, to secure amongst creditors an equal distribution of the debtor's effects, where he is unable to pay each creditor 20s. in the £1 in full. That being so, I think this was a fraudulent preference. Bartholomew, knowing the debtor was embarrassed. —was insolvent,—received the money with that knowledge, and must be held to have known that the debtor was committing a fraud on his other creditors, and that the debtor was not acting in good faith.

There will be an order for payment of £420 6s. to the trustee, with costs of the motion.

Solicitor for trustee: *Morton & Powers.*

Solicitor for Young & Co.: *Lilley & O'Sullivan*, agents for *Stafford*, Maryborough.

IN CHAMBERS. *Post p. 197.*

HARDING, J. 1st November, 1889.

LANCASTER *v.* FRASER.

Practice—Production of Documents—Inspection—Accountant.

L. obtained a consent order to inspect documents in the possession of the defendant, and finding he would require professional assistance, applied to the defendant to be allowed to bring an accountant with his solicitor's clerk. The defendant refused on the ground that the proposed accountant was hostile to him.

Held, that L. had a right to bring the accountant to inspect.

Lindsay v. Gladstone, L.R., 9 Eq., 132, followed.

SUMMONS for order for production of documents.

Feez, for the plaintiff, applied that the defendant be ordered to produce, for the inspection of the plaintiff, his solicitors, and agent, at such time and place as His Honor might appoint, the several books and documents mentioned and referred to in the affidavit of the defendant sworn herein, and that A. T. Lawson, accountant, of Edward Street, Brisbane, be allowed to attend and assist at such inspection on behalf of the plaintiff, with liberty to take extracts from such books and documents. An experienced clerk from the office of the plaintiff's solicitors had attended and

inspected the documents, and found he would require professional assistance. The plaintiff was entitled to an inspection by his agent, but the defendant refused to allow him to do so. (*Lindsay v. Gladstone*, L.R., 9 Eq., 132.)

HARDING, J.: How will fair play be frustrated by the plaintiff being accompanied by his professional adviser?

Woolcock, for the defendant: Lawson was hostile to them, having been dismissed from the defendant's service. He might make improper use of the information obtained; the *onus* was on the plaintiff to shew that the accounts were complicated. A consent order was made, and a clerk from the plaintiff's solicitors' office had inspected the documents. The defendant is willing to allow any one else than Lawson to inspect. (7 *Jurist*, 86, and *Seton's Decrees*, 155, were cited.)

HARDING, J.: You have not stated that. A trial is immensely shortened by having witnesses of this kind in court. Every facility in modern practice should be given for inspection. I follow *Lindsay v. Gladstone*, L.R., 9 Eq., 132.

Order, accordingly; plaintiff's costs, costs in action.

Solicitors for plaintiff: *Hart & Flower*.

Solicitor for defendant: *Hellicar*.

HARDING, J. 7th November, 1889

Re MARSLAND AND MARSLAND, AND *Re* KIRKBRIDE AND ANOTHER *v.* NEW DAY DAWN FREEHOLD GOLD MINING COMPANY.

Practice—Inspection of Documents—Change of Solicitors—Lien—Costs.

An action having been instituted and a consent order made for a change of solicitors, the new solicitors applied to inspect documents in the hands of the former solicitors, who refused on the ground that they had a lien on these documents for an unpaid bill of costs.

Held, that, the new solicitors on behalf of the defendants were entitled to a delivery of the documents for inspection. (For order, see *Seton*, p. 637, f. 3.)

Robins v. Goldingham, L.R., 13 Eq., 440 approved.

SUMMONS for delivery of documents on change of solicitors.

Affidavits were filed, from which the following statement is taken:—Messrs. Marsland and Marsland, of Charters Towers, previously to and since the date of the commencement of an action in which Kirkbride and the Day Dawn Gridiron Gold Mining Company, Limited, were petitioners, and the New Day Dawn Freehold Gold Mining Company defendants, acted for the defendants. In September, 1889, Marsland and Marsland discharged themselves, and ceased to act as such solicitors, and Messrs. Jarvis and Turner are and have since acted as solicitors for the said company. Marsland and Marsland were applied to to deliver up papers in the said action, and refused, as they claimed a lien on the said papers for costs incurred by them whilst acting for that company. The new solicitors then wrote to the former ones that they were willing, on delivery of the documents, to give a written undertaking to hold them without prejudice to their lien, and to return them undefaced within twelve days after the conclusion of the action. To this the former solicitors wrote back that if the new solicitors would sign a consent order that the money paid into the Warden's Court was to be applied in payment of what should be found due to them on taxation, and all costs of the petition, they would accept it as security, and hand over the documents. Considerable expense had been incurred, and the defendants had been prejudiced and embarrassed by the refusal of Messrs. Marsland and Marsland to consent to a change of solicitors, and to deliver up the documents. An order for taxation of costs had been made, and was being proceeded with. By a consent order of the 2nd October, 1889, Messrs. Jarvis and Turner were substituted as defendants' solicitors. Messrs. Marsland and Marsland denied that they had discharged themselves as solicitors for the defendant company.

Macnaughton, for the defendants, in applying for an order for delivery of documents on change of solicitors, stated the above facts as mentioned on affidavit, and cited *Robins v. Goldingham*, L.R., 13 Eq., 440; *Seton, Decrees*, 641; *Re Boughton*, 23 Ch.D., 169; *Batten v. Wedgwood*

Coal and Iron Co., 28 Ch.D., 317, 319. The plaintiffs are pressing on the action, and the defendants require immediate relief.

Shand, for Messrs. Marsland and Marsland, stated that, in the face of *Robins v. Goldingham*, he could not contend that his clients had not discharged themselves. They were evidently under a false impression on that point. The former solicitors had no desire to embarrass the defendants, and the papers were offered on security being given.

HARDING, J.: Order, as in form 3, *Seton*, 637; twelve days for return of documents. Costs of Messrs. Marsland and Marsland, of this application, to be added to their costs against the defendants, already incurred.

Solicitor for *Marsland and Marsland: Hellicar.*

Solicitor for defendants: *Bunton*, agent for *Jarvis and Turner*, Charters Towers.

OCTOBER SITTINGS OF THE FULL COURT.

BENNETTS *v.* NO. 5 NORTH PHŒNIX GOLD MINING COMPANY, LIMITED.

Patent — Infringement — Specification — Insufficiency—Novelty.

The plaintiff, as patentee of a high pressure water jet ventilator for ventilating mine workings, claimed damages and an injunction for infringement of his patent by defendants. He obtained a verdict from the jury in his favour, and judgment was entered for him accordingly. The patent was a simple and previously known and used contrivance, the essential part of which is described by plaintiff in his specification as consisting in "conducting a small quantity of water from a height" to descend in a vertical direction through a pipe of about 1 inch diameter, which is fitted at its lower extremity with a small jet cock of about ¼ inch internal diameter; through this cock a jet of water is forced in fine spray, so as to carry a current of air with it into an air-pipe leading to the workings requiring ventilation. Plaintiff's ventilator had one hole, and the defendants' had three holes in the jet.

Held, that the description in the specification was too large, and not clear enough as to *differentia*.

On that ground, and on the grounds of want of novelty and of previous use, rule absolute for nonsuit was granted with costs.

MOTION to make absolute a rule *nisi*, granted after several applications by defendants, for a nonsuit, or for entry of verdict and judgment for the defendants.

The action was for infringement of a patent, and was tried before Mr. Acting-Justice Chubb and a jury of four at the August Civil Sittings in Brisbane.

Plaintiff described his invention as consisting in conducting a small quantity of water through a small pipe to a point at least one hundred feet vertically below the point of supply, where the lower extremity of the pipe is fitted with two small jet cocks of about ¼in. internal diameter, through which, when turned on, the water is forced in fine spray, carrying a current of air with it. One jet is directed into a funnel-mouthed air-pipe leading to the portion of the mine to be ventilated; the other being used to create an upward draught to clear out bad air.

Plaintiff's jet had one hole through which the water was forced, and defendants', of practically similar pattern, had three holes. Plaintiff had constructed the defendants' ventilator. Parties joined issue on all the points as to novelty, usefulness, &c. Defendants relied also upon the objections that plaintiff's invention was well known, that there was no new mechanical combination in it, and that his specifications were insufficient and ambiguous. Evidence was given of previous inventions like plaintiff's. The jury found a special verdict for the plaintiff. Upon the verdict judgment was entered for £10 and costs, with an injunction.

Sir S. W. Griffith, Q.C. (*Lilley* with him), moved the rule absolute for defendants. *Real*, for plaintiff, opposed.

The following cases were cited:—*Clark v. Adie*, 2 App. Ca., 315; *Gosnell v. Bishop*, Cutler's Rep., P.D. & T-M. Cases, January, 1888, p. 41; *Hinks v. Safety Lighting Co.*, 4 Ch.D., 607; *Jordan v. Moore*, 1 C.P., 624; *Harwood v. G. N. Rail. Co.*, 35 L.J., Q B., 27, and 11 H. of L. Ca., 654; *Holmes v. London and N.W. Rail. Co.*, 22 L.J., C.P., 57; *Patterson v. Gas, Light and Coke Co.*,

3 App. Ca., 239; *Foxwell v. Bostock*, 4 De G. J. & Sm., 298, and 12 W.R., 723; *Tetley v. Easton*, 2 E. & B., 956, and 2 C.B., N.S., 706.

Griffith, Q.C., in reply.

The following judgment was delivered:—

HARDING, J.: This is an action brought by the plaintiff for the infringement of a patent, which may be shortly described as a high pressure water jet ventilator. An injunction was sought and damages for the infringement. The action was tried at the last Brisbane Sittings of the Supreme Court, before my learned brother, Mr. Acting-Justice Chubb. At that trial Sir S. W. Griffith, at various stages of the case, moved for nonsuit and for entry of a verdict for the defendant, and he subsequently renewed these applications which are now before us, on the same grounds as he took on the hearing. The action being for the infringement of a patent, the ordinary issues had to be put to the jury: preliminary questions as to fees; novelty; who was the inventor; usefulness of the invention; the date of registration; and whether the specifications particularly ascertained the nature of the invention. Now, as to these, the jury found in favour of the plaintiff, after direction by the judge, given in the usual way, no doubt, as given by us where an application for nonsuit has been made, namely, in such a way that, if it is not a proper case for nonsuit, the verdict may stand. If it is a case for nonsuit, then the verdict is set aside and the proper judgment is entered.

Although at the trial the plaintiff got all the questions decided in his favour, there is the question behind all that, whether nonsuit should be granted or not. The question here was, whether the specification, which was Exhibit No. 2 at the trial, of the High Pressure Water "One-Jet" Ventilator, was large enough to cover not only a three-jet, but any high pressure water jet ventilator that might have been in use previously. The introduction of one objectionable item into a patent is fatal to the whole. A specification is bad, if the description of what the patentee claims is large enough to cover the novelty, and also something which was known before. I should describe the requisites of a specification as, first of all, a general name for the invention, and then a description of it in such popular language that a person, ordinarily conversant with the matters therein described, would for his own benefit be able to make the article therein described. Then, after the popular description of the article, comes the after part describing particularly the novelty which he intends to patent; there he must cut his description down to the exact thing which he says is new, and, if he allows any item, which was known and used before, to remain in that part of his specification, the whole is invalidated. Now criticising this specification, the plaintiff claims that he is "the first and sole inventor of the high pressure water jet ventilator for ventilating mine workings;" that it is an altogether and entirely new invention. The words which describe his invention are "the high pressure water jet ventilator for ventilating mine workings." This is the name or title which he has already given in the beginning of the specification. Then he describes and distinguishes the invention, as consisting in conducting a small quantity of water from a height, to descend in a vertical direction through a pipe, which is fitted with two small jet cocks at its lower end, of about ¼inch internal diameter. Now, at the time this specification was filed, there was in use and known upon the Gympie goldfield, a high pressure water jet ventilator, which had been constructed by the plaintiff himself, and, except for the fineness of the finish of this one, the only difference between that and this, is that the cock in that had three holes, whereas the cock in this had but one. I cannot but feel that this is a claim by plaintiff to all high pressure water jet ventilators for ventilating mines. The description of the one-hole ventilator is good for the three-hole one. That being so, I think the claiming part of the specification is too large, and that under it, any person using the previously used ventilator, could be restrained, if this is a valid patent. That is wholly opposed to our patent law; a man cannot get a patent for what is already in use and known.

That being so, the proper course would have been to withdraw the case from the jury. I think the rule must be granted on the grounds, that it appears to have been in use before the application for this patent was made, and that the specification, as to the *differentia*, is not clear enough. There will be a rule absolute for nonsuit, with costs.

LILLEY, C.J., concurred.

Solicitors for plaintiffs: *Chambers, Bruce and McNab.*

Solicitors for defendants: *Bernays & Osborne*, agents for *Tozer & Conwell*, Gympie.

DECEMBER SITTINGS OF THE FULL COURT.

MEYENBERG *v.* PATTISON AND OTHERS.

11 QLJ 92. 1927 St.R.Qd. 155 — 160

Partnership—Unwritten contract to admit as partner—Declaration of trust—Statute of Frauds—Interest in mining lands.

Plaintiff had been manager of defendants' crushing battery on a weekly salary, at a mine held in common by defendants and other partners. He alleged in his claim that while the defendants were part owners of the mine, and negotiating for the purchase of the interest of the other partners, equal to seven-twentieths, they had agreed with him that, in consideration of his continuing in charge of the battery until the completion of the purchase, they would give him a share in the seven-twentieths so purchased, equal at the purchasing price to £2,500.

From the evidence for the plaintiff it appeared that the purchase was made at the price of £60,000, and, the plaintiff having continued in charge of the battery, the defendants declared, after the purchase, that they held a share therein upon trust for him, and would transfer it to him when the seven-twentieths was divided between them and certain other shareholders. The partnership was then registered as a limited liability company, and the shares allotted to the original shareholders in proportion to their interests in the partnership. The defendants, however, refused to transfer to plaintiff a share in the interest, or to allot him shares in the company. He therefore claimed a declaration that defendants were trustees for him of such interest and shares, and other necessary relief.

The defendants pleaded a denial of the agreement and declaration of trust alleged; and further relied on the *Statute of Frauds*, as neither the alleged agreement or declaration, which related to realty, was in writing or signed. The mine was partly freehold and partly mining leasehold. Upon the hearing of these issues below, the jury had failed to agree. Subsequently, defendants moved the Court for a judgment of nonsuit or for the defendants, on the ground that there was no evidence against them, and on the defence of the *Statute of Frauds*.

Held, that the promise, assuming the case for the plaintiff proved, was a purely gratuitous and a voluntary promise, in return for a past consideration, and that there was no contract.

Kennedy v. *Brown*, 13 C.B., N.S., 740, approved.

On the evidence, in the opinion of the Court, there was no declaration of trust by defendants as alleged. But assuming that there was evidence of a contract or of a voluntary declaration of trust, the subject matter was, on the evidence, partly freehold and partly leasehold; and was held in common by the partners and used for partnership purposes, and not as an asset; it was therefore, realty, and the *Statute of Frauds* must apply.

Steward v. *Blakeaway*, L.R., 4 Ch. 600, 6 Eq., 479, applied.

Sir S. W. Griffith, Q.C., Real and Lilley with him, appeared for the defendants; and *Byrnes, King* with him, for the plaintiff.

The facts appear from the judgment.

The following authorities were cited:—

Sir S. W. Griffith, Q.C.: Leake on Contracts, 296; *Caddick* v. *Skidmore*, 27 L.J., Ch., 153, 2 De G., F. & J., 52: *Boyce* v. *Green*, Batty, 608; *Corley* v. *Chippendale*, 1 Q.L.J., 69; *Morris* v. *Glyn*, 27 Beav., 218; *Sugden, Vendors and Purchasers*, 14th ed., 127; *Taylor* v. *Brewer*, 1 M. & S., 290; *Roberts* v. *Smith*, 4 H. & N., 315, 28 L.J., Exch., 164; *Lampleigh* v. *Braithwait*, 1 S.L.C., 151, Hob., 105; *Jones* v. *Locke*, L.R., 1 Ch., 25; *Richards* v. *Delbridge*, L.R., 18 Eq., 11; *Bretton* v. *Woollson*, L.R., 17 Ch.D., 442; *Ashworth* v. *Munn*, 15 Ch.D., 363; *Armstrong* v. *Symperson*, 19 W.R., 558; *Dale* v. *Hamilton*, 2 Phil., 266.

Byrnes: Lindley, 5th ed., 52; *Syers* v. *Syers*, L.R., 1 App. Ca., 174; *Pawsey* v. *Armstrong*, L.R., 18 Ch.D., 698; *Jeffries* v. *Smith*, 1 Jac. & W., 297; *Fereday* v. *Wightwick*, 1 Russ. & M., 45; *Crawshay* v. *Maule*, 1 Sw., 495; *Phillips* v. *Phillips*, 1 Myl. & K., 649; *Case of the Bank of England*, 3 De G., F. & J., 645; *Davies* v. *Games*, L.R., 12 Ch.D., 813; *Waterer* v. *Waterer*, L.R., 15 Eq., 402; *Dale* v. *Hamilton*, 5 Hare, 369; *Foster* v. *Hale*, 5 Ves., 309; *Bradford* v. *Roulston*, 8 Ir. C.L. Rep., 468; *Pollock on Contracts*, 187.

King: *Edwards* v. *Hall*, 6 De G., M. & G., 74; *Murtagh* v. *Costello*, 7 L.R., Ir., Ch. App., 428; *Caddick* v. *Skidmore*, 27 L.J., Ch., 153; *Entwistle* v. *Davis*, L.R., 4 Eq., 272; *A.-G.* v. *Hubbuck*, L.R., 13 Q.B.D., 275; *A.-G.* v. *M. of Aylesbury*, L.R., 16 Q.B.D., 408.

The judgment of the Court was delivered as follows, on 3rd December, 1889, by CHUBB, J.:—

THIS was an action heard before me, as an acting Judge of the Supreme Court, and a special jury, at the Civil Sittings, Brisbane, on the 12th, 13th, 14th, 15th, 16th, 19th, 20th and 22nd of August last. The plaintiff, by his statement of claim, alleged—

That in 1883 and 1884 he was in the employ of a partnership firm—consisting of the defendants, one Frederick Morgan and others, then carrying on mining operations at a certain gold mine, known as Mount Morgan, as partners in the co-adventure in unequal shares—as manager of their crushing battery, at a weekly salary of £5.

That from January to April, 1884, negotiations were being carried on, between the defendants on the one part, and Frederick Morgan, for himself and the other members of the firm, on the other part, representing an interest in the mine equal to seven-twentieths of the whole, for the purchase by the defendants of that seven-twentieth interest for the sum of £60,000.

That in April, 1884, an agreement was made between the defendants and the plaintiff that, in consideration that the plaintiff would continue to take charge of the said battery, the defendants would, in case the negotiations for the purchase of the seven-twentieth interest were successful, reserve for and transfer to the plaintiff a proportionate share in the said seven-twentieth interest, equivalent at the purchasing price to the sum of £2,500.

That the plaintiff accordingly continued to take charge of the battery, and, the negotiations resulting successfully, the defendants became the purchasers of the said seven-twentieth interest at the price stated, and the same was transferred to them, and thereupon the defendants declared that they held a share in the said seven-twentieth interest, equivalent at the then purchasing price of £60,000 to the sum of £2,500, upon trust for the plaintiff, and would transfer the same to him when the said seven-twentieths was divided amongst the defendants and the divers other persons who claimed shares therein through the defendants,

That the Company was afterwards, on 1st October, 1886, duly registered as "The Mount Morgan Gold Mining Company, Limited," and the property of the partnership was transferred to the Company, and the defendants and other original shareholders received shares in the Company in proportion to their respective interests in the partnership.

That the seven-twentieth interest was divided amongst the defendants and the divers other persons aforesaid other than the plaintiff, and shares in the Company allotted to them in respect thereof, but that the defendants refused to transfer to the plaintiff his share in the interest, or to procure for him the allotment of 14,584 shares in the Company, representing and equivalent to the value of such share.

The plaintiff therefore claimed a declaration by this Court that the defendants were trustees for the plaintiff of a proportionate share in the said mining co-adventure, equivalent at the purchasing price mentioned to £2,500, and of the 14,584 shares in the Company representing such share, and such further relief, by order, account, injunction and otherwise, necessary to give effect to such declaration.

The defendants pleaded a denial of the alleged agreement and declaration of trust respectively, and they relied as a further defence on the *Statute of Frauds*, on the grounds that the alleged agreement and declaration of trust respectively related to lands and an interest therein, and that neither the agreement nor the declaration of trust was in writing or signed as required by the Statute.

Upon this issue was joined.

At the close of the plaintiff's case, Sir S. W. Griffith, Q.C., for the defendants, applied for a nonsuit on the grounds—

(*a*) That there was no evidence of any contract to go to the jury.

(*b*) If there was, that the contract was one relating to an interest in land, and was not in writing as required by the *Statute of Frauds*.

The judge abstained from determining the question of law upon the *Statute of Frauds*, and decided in the exercise of his discretion to take the finding of the jury upon the facts, and refused the nonsuit.

Evidence was then adduced for the defendants, and in reply for the plaintiff.

In the course of his summing up, the judge intimated to the jury his opinion that upon the evidence there was no case against the defendants Pattison and Walter Hall, but, as he desired to obtain their opinion upon the facts, he expressly refrained from directing them so to find.

The defendants' counsel then asked the judge formally—

(*a*) To direct the jury to return a verdict for the defendants Pattison and Walter Hall, on the ground that there was no evidence against them; and

(*b*) To direct the jury to return a verdict for all the defendants, on the defence of the *Statute of Frauds*.

This the judge refused to do.

Questions were submitted by the judge to the jury on the issues raised by the pleadings and the evidence of the parties. The jury, after deliberation, being unable to agree, were discharged from giving a verdict, and leave was given to either party to move the Full Court, as they might be advised. Subsequently (August 30th) a formal application was made to the judge by defendants' counsel for judgment of nonsuit to be entered upon the admitted facts, which was refused.

The defendants' counsel have now, pursuant to leave reserved, moved this Court for a judgment of nonsuit, or for the defendants, upon the same grounds as were urged in the Court below.

The jury having failed to find the facts, we assume them (for the purposes of this motion) to have been proved favourably to the plaintiff. It is not material to this judgment (though significant) that every material part of the plaintiff's case was flatly contradicted by the defendants. In considering the questions now raised for decision, we must, as we do, lay on one side the whole of the evidence given for the defendants, and determine the case entirely and alone from and by the evidence adduced in support of the plaintiff's case.

To state the plaintiff's case as succinctly as possible:—

The plaintiff, a gold miner of considerable and many years' experience in the management of quartz-crushing batteries, was in or about January, 1883, engaged by Frederick Morgan, then one of the owners of the Mount Morgan Gold Mine—the other owners being his brothers Thomas, Edward, and his son Frederick, and the defendants Thomas Hall, D'Arcy, Pattison, and Walter Hall (whose share then stood in his brother Thomas's name)—to go to Mount Morgan and take charge of the quartz-crushing battery there. The engagement was a weekly one, and the pay £5 a week. Plaintiff was introduced to defendant Thomas Hall by Frederick Morgan; and, in the course of conversation, Hall said to plaintiff, it (meaning the mine) would be a good thing, and a big thing; if it turned out well, and the plaintiff got a good start with the battery, they would not forget him.

At this time the mining property, known then as the Morgan's Mount Gold Mining Company, was held by the Morgans and defendants, under the provisions of an agreement bearing date September 11th, 1882. [Exhibit No. 3.] By this agreement the Morgans, acting by Frederick Morgan, sold to Thomas Hall one undivided moiety of the mine, in consideration of an expenditure to be made in the erection of a shoot and machinery to the extent of £2,000, and expressly

authorised Hall to transfer one-fourth of his purchase to Pattison, and another one-fourth to D'Arcy, such transaction to be authenticated by Pattison and D'Arcy endorsing their acceptance on the agreement, which was done. The agreement placed the management of the mine in Frederick Morgan and Thomas Hall, and empowered them to carry on and conduct the same in any way they might think fit, appoint and pay at discretion employés to develop the mine, and employ the profits thereon, and do all things in that behalf (save selling and hypothecating the same), as if they were absolute owners. Further, Morgan, Hall, Pattison and D'Arcy were prohibited from selling or hypothecating their respective interests in the mine without the previous written consent of Morgan and Hall.

The plaintiff went out to the mine on the 12th of February, 1883, and, with the exception of a trip to Melbourne on sick leave, remained there till April, 1887, when he left in manner hereafter described.

The plaintiff at first had a good deal of trouble to get the battery to start work. Afterwards, when it was in working order, a great quantity of gold was got. This the plaintiff (as he says), having no place of safety to keep it in, carried about in the tent, or hid it at the battery. There was no police protection, and there was considerable rowdiness, and the plaintiff was very much alarmed at the insecurity of the place and the danger of having to guard so much gold, having on occasions from 1000oz. to 2000oz. at one time. This went on till December, 1883, when he was supplied with a safe.

During the latter half of this year, and subsequently, some of the Morgan family and some of the defendants were continually quarrelling about the mine and the battery. On one occasion, on about June, 1883, D'Arcy and Frederick and Thomas Morgan were quarrelling about an adjoining claim (called No. 1 South, and which was afterwards brought into the concern), taken up by the Morgans, which D'Arcy claimed ought to be the property of the partners, and a conversation in reference to this ground took place between plaintiff and D'Arcy. This claim the plaintiff had wished to take up himself previously, but desisted at the request of Thomas Hall, and because he had also promised not to take up any ground at Mount Morgan. When discussing this, plaintiff said to D'Arcy, "You might have let me take up that ground, and then you could have stood in with me; but now the Morgans have left you out," to which D'Arcy replied, "Never mind, Meyenberg; I'll make them put us into it. You may depend on me; I'll never forget you." At this time the mining property was being held by the Morgans and the defendants, under the provisions of an agreement bearing date June 6th, 1883 [Exhibit No. 4], which declared the property to belong exclusively, as to one moiety or half part thereof, to the Morgans as tenants in common, and as to the other moiety or half part thereof to the defendants as tenants in common.

We now come to the period when the material part of the plaintiff's case begins. In January, 1884, Thomas Hall and D'Arcy visited the mine. The plaintiff complained to them about the way things were going on, and said that he didn't care about staying there any longer, and that they had better stop themselves. Plaintiff did not then tell them why he didn't wish to remain. He says they knew—that he had spoken to them before, and told them that his life was in danger, the place was very rowdy, there was no police protection, and the Morgans were always quarrelling among themselves. D'Arcy said to plaintiff, "Stop on; there must be a change soon; we're sure to get the Morgans out, and we'll give you an interest." Thomas Hall also asked plaintiff to stay on, and to try and get along the best way he could, that there'd soon be an alteration—all those things would very soon blow over—and that, if plaintiff would stay on, he would get some interest, as the Morgans would go out, or be bought out. There were repeated conversations subsequently to this about staying on, and about buying out the Morgans, between plaintiff and Thomas Hall—every week the matter was spoken of. The plaintiff remained on. There was also a

conversation between plaintiff and Thomas Hall about plaintiff buying out the share of Edward Morgan, when Hall said, "Leave it alone; we are sure to buy the Morgans out, and you'll get an interest in it."

To go back a little, it appears from the evidence of Frederick Morgan, that after the agreement of 6th June, 1883, D'Arcy and Hall, first one and then the other, began negotiations with Frederick Morgan for the purchase of the Morgans' interest in the property, and these were continued at intervals up to April, 1884, when a purchase of three out of the four shares was arranged. There had been disagreements between Frederick Morgan and Thomas Hall about an alleged waste of gold, and in consequence of the battery being worked in a manner he (Morgan) disapproved, and as he could get no satisfaction from Thomas Hall, he determined to sell out. Frederick Morgan arranged to sell and did sell to D'Arcy for £60,000, and the arrangement which was primarily verbal, was subsequently embodied in an Indenture bearing date June 2nd, 1884, (Exhibit No. 5.)

Matters at the mine remaining as described about the 28th April, 1884, the plaintiff received a letter from Thomas Hall, telling him that they had bought out the Morgans, and that after the following Saturday, the Morgans would have nothing more to do with the mine, On the 1st May, Thomas Hall and D'Arcy went to the mine and had a conversation with the plaintiff, the material part of which was as follows: Hall said, "I suppose you've heard the news." Plaintiff said, "Yes; its almost too good to be true." Hall replied, "Yes, we have bought him out; come inside." They went into plaintiff's tent. Hall continued, "Yes, Meyenberg, we have bought him out. We had a hard struggle, but its all settled now. I'll tell you what we have done—we have reserved you two thousand five hundred pounds worth out of one of the Morgans' shares. At present they'll be kept all together until they are paid for out of the dividends, and as soon as a division takes place, yours will be handed over to you free of charge, no matter where you will be Now Meyenberg, from this you'll have a finger in the pie. You know yourself how things stand. No one has any writing, but when a division takes place, yours will be handed over to you free of everything."

D'Arcy said, "We have paid the first deposit, and you've no need to bother yourself about your interest." D'Arcy also told plaintiff that they had sold one share to Ferguson, upon which plaintiff said, "You might have given me a chance to buy the share you sold to Ferguson. I could have found the money and then would have had a big interest in it." D'Arcy replied, "You've enough, what do you want more for?"

Thomas Hall then told plaintiff, and plaintiff then for the first time knew that they had paid £60,000 for the shares bought from Morgan. The shares bought were, Frederick Morgan's, Edward Morgan's, and Frederick Morgan's, junior.

Shortly after this, the defendants and Ferguson went out to the mine. There was a photographer there taking views. He took a group which included the plaintiff, and one Vautin, who was engaged at the mine experimenting on the tailings, but not otherwise interested in the mine. This piece of evidence was given to shew the familiar and friendly footing on which plaintiff and defendants stood, and to introduce a statement made by D'Arcy to plaintiff when the photograph was about to be taken, viz.: "Come on Meyenberg, we are going to be taken; we are all in it now."

The purchase of shares was carried into effect on the 2nd of June, 1884, the shares which Frederick Morgan sold to D'Arcy, were his own, his son's, (Frederick) and his brother's, (Edward) which Frederick had acquired in the meantime.

D'Arcy refused to take the son's share on account of his being a minor—therefore, Thomas Morgan, Frederick Morgan's brother, transferred his share to D'Arcy instead, and took from Frederick Morgan an assignment of the son's share with a covenant by Frederick Morgan to pay him £20,000 if the son on attaining his majority, refused to confirm the sale. This transaction will be found recorded in the Indenture of June 2nd,

1884, [Exhibit No. 5;] another Indenture of same date, [Exhibit No. 7;] and a Release dated 30th October, 1885, [Exhibit No. 6.]

On the 16th June, 1884, an agreement was entered into between Frederick Morgan and the defendants, and John Ferguson [Exhibit No. 15]; which after reciting the agreement of the 6th of June, 1883, and an assignment by the four Morgans of one-fifth of their interest in the prospecting claim (part of the entire property) to Thomas Hall, and that the whole property was held by Frederick Morgan and Thomas Hall upon trust for the parties in the shares and proportions following:—

As to one-eighth of the mine, excepting the prospecting claim, and as to nine-fortieths of the prospecting claim for Thomas Hall, as to one-eighth of the mine for D'Arcy, as to one-eighth of the mine for Pattison, as to one-eighth of the mine for Walter Hall, and as to one-eighth of the mine, excepting the prospecting claim, and as to one-tenth of the prospecting claim for Thomas Morgan, and as to other two eighth shares of the mine, except the prospecting claim, and as to two-tenths shares of the prospecting claim for D'Arcy, and as to the remaining one-eighth share of the mine, except the prospecting claim, and as to one-tenth of the prospecting claim, for John Ferguson. And further reciting that the three last mentioned three-eighth shares of the mine, except the prospecting claim, and the three last mentioned three-tenth shares of the prospecting claim, were held upon trust for D'Arcy and Ferguson, subject to an Indenture of Mortgage by D'Arcy to Frederick Morgan, of the 2nd June, 1884 [Exhibit No. 5, before mentioned]. And that it was expedient to modify the agreement of 6th June, 1883, it was agreed that Thomas Hall, Pattison, D'Arcy, Walter Hall, Thomas Morgan, and John Ferguson, would become and remain partners in continuation of the business of miners carried on by the parties to the agreement of 6th June, 1883, from the 2nd June, 1884, for so long as any two of them should live, (subject to determination as thereinafter mentioned) under the style of "The Mount Morgan Gold Mining Company." The property was declared to be held by Frederick Morgan and Thomas Hall upon trust for the firm. Then followed the usual articles of a partnership agreement, with a declaration that the partners should be entitled to the nett profits, thus:—As to all but the prospecting claim, D'Arcy three-eighths, and the others one-eighth each; as to the prospecting claim, Thomas Hall, nine-fortieths; D'Arcy, thirteen-fortieths; Pattison and Walter Hall, each five-fortieths; and Thomas Morgan and Ferguson, each four-fortieths. Any partner was to be at liberty to sell his share or part thereof, subject to giving the others the first offer of purchase, and provision was made subject to certain conditions not necessary to mention, for the sale of the whole to a Company, the partners to receive shares in such Company equivalent to their respective interests in the mine.

On the 28th June, 1884, Thomas Morgan sold Frederick Morgan junior's share to D'Arcy for £30,000. [Exhibit No. 8.]

On the 3rd September, 1886, Frederick Morgan, junior, executed a deed of confirmation of the sale of his share in consideration of a further payment to him of £10,000, [Exhibit No. 10] and on the same day D'Arcy executed to Frederick Morgan and Thomas Morgan, a release of their covenants, [Exhibit No. 9] and then the Morgans were at last fully divested of all their several interests in the mine.

To go back to 1884—In August, Thomas Hall explained to plaintiff how the Morgan shares were going to be divided—plaintiff was to get £2,500 worth of one share valued at £20,000. About December, 1884, plaintiff received a letter from defendant Walter Hall, dated October 17th, 1884, [Exhibit No. 12] in which it was stated that the writer had heard that a small share was being held for plaintiff in one of the Morgans' shares.

In July, 1885, plaintiff being ill, went on sick leave to Melbourne, and remained away till September of same year. On his return he saw the defendant Pattison at the latter's house in Rock-

hampton. Pattison then told him that they had put Mount Morgan into a Company of a million scrip of £1 shares, 17s. 6d. paid up, and said, I've got you £500 worth—that will come to about £3,000 scrip. This, old man, is something for you you can depend on, and as soon as the scrip will be given out, that wont be long, you will get yours like the others—something you can depend on.

In November, 1885, D'Arcy and Thomas Hall told plaintiff that there was another £10,000 to be paid, as young Frederick Morgan had come of age and he would not sign the transfer without getting £10,000 extra, and that all this £10,000 had to be put on to the share in which plaintiff was to get his interest. They also said plaintiff couldn't get his dividends and scrip until the £10,000 was paid off. In December, 1886, D'Arcy and Pattison were at the mine. Plaintiff asked them when he was going to get his scrip. D'Arcy said, "You'll be all right, Meyenberg." Plaintiff said, "I ought to have got my scrip as well as the others. I worked harder than any of them to get the property together." Pattison replied, "You'll be all right, Meyenberg—we are very thankful to you and recognize what you have done." Plaintiff said, that was all right, but he couldn't live on that. They both assured him that it would be all right as soon as the money was paid off.

In April, 1887, plaintiff left Mount Morgan. On the 21st of that month, plaintiff met Pattison coming out of the Queensland National Bank, Rockhampton. A dividend had been declared the day before. Plaintiff said, "What about my dividend?" Pattison replied, he didn't know, but Callan was agent for Hall and D'Arcy, and he would make it all right, and asked plaintiff to see him (Pattison) at his office on the 23rd, and he would see it all right so far as he was concerned, saying, "I am willing to give you my part of any promise." On the 23rd, plaintiff went to Pattison's office. Pattison said he could do nothing then, but he would write to Hall and D'Arcy who were in England, or send them a cable, but he thought writing would do, as plaintiff was not in a hurry, and he was sure it was all right, and he would let plaintiff know as soon as he got an answer from them, which would not be long. Plaintiff never returned to Mount Morgan, and after an interval of nine months, and getting no satisfaction, commenced this action.

In cross-examination by Sir S. W. Griffith, the plaintiff referred to an entry made by him in a diary produced, in which appeared under date May 2nd, 1884, the following:—"T. S. Hall promised me one-eighth in one of the Morgans' shares." D'Arcy was there in my tent. Plaintiff in further cross-examination said, "When they (Hall and D'Arcy) first spoke I expected £2,500 worth. Nothing was defined. I never asked what interest I was to get. I never spoke about what I expected to get. I left it entirely to them to say how much, until the 1st of May, when they told me they'd give me so much" (*i.e.* £2,500 worth). And again with reference to the conversation with Pattison in September, 1885, when Pattison said he had got him £500 worth in the mine, that he thought extra—he thought it was a present. Now this being the case put forward by the plaintiff, the following questions arise:—

1st. Is there any evidence of a contract in fact.

2nd. Is there any evidence of a voluntary declaration of trust.

If there is—

(*a*) Does the contract relate to an interest in land, which for want of a writing is, by force of the *Statute of Frauds*, incapable of being enforced at law?

(*b*) Does the declaration of trust relate to an interest in land, which not being manifested and proved by writing is, by force of the *Statute of Frauds*, void?

It is quite clear as matter of fact that there is not a scrap of writing of any kind, which, even by the cleverest ingenuity, is capable of being twisted into an agreement or memorandum, or note of an agreement, or a declaration of trust within the Statute. The letter of Walter Hall to plaintiff of October 17th, 1884, certainly contains the following statement—"I hear there is a small interest out of one of the Morgans' shares held for you when

money has been taken out to pay for it," but this is so palpably lacking in the essential elements required by the Statute that it amounts to nothing in point of law. And plaintiff's counsel only put this letter forward as some evidence of knowledge by Walter Hall of the declaration, to go to the jury against him as evidence of ratification. Consequently we are driven back to decide the case upon the parol testimony, and if the subject matter of the alleged agreement or declaration of trust is land or an interest in land, it necessarily follows that on the defence of the *Statute of Frauds* the defendants must succeed.

Now as to the first question—whether there is evidence of a contract in fact—it is elementary law that a promise must be reasonably certain, and there must be for that promise a consideration. If the parties have expressed the matter of their agreement in such uncertain or imperfect terms, that it is impossible to ascertain any definite meaning or to construct a perfect contract out of them, the agreement is necessarily void. Is that the case here? At the time the negotiations for the purchase of the Morgans' shares were going on, the plaintiff was an employé of the Association, which included the Morgans as well as the defendants—he was the servant of them all. No change was then or afterwards (except as to the personality of his employers) made in his position, pay, or duties as manager of the battery. Being for the reasons stated by him in evidence anxious to leave the mine in February, 1884, the plaintiff says that Thomas Hall and D'Arcy then asked him to stay on, and he would get a share if and when the Morgans were bought out. How long was he to stay? what share was he to get? of what value? and who was to give it? None of these things were mentioned, if at all, before the 1st May, 1884, on which date the Morgans had in fact been bought out. Indeed, it is clear that up to that date everything was of the most indefinite character, as the plaintiff himself says in his cross-examination —"Nothing was defined; I never asked what interest I was to get; I never spoke about what I expected to get. I left it entirely to them to say how much, until the 1st of May, when they told me they'd give me so much; and I first heard of the price £60,000 on the 1st of May."

Putting together all the statements made by the plaintiff and Thomas Hall and D'Arcy prior to the 28th April, 1884, when the shares were purchased, can we construct therefrom a perfect contract, with its terms so clearly defined as to leave no doubt as to the intention and meaning of the parties? We think not. Then is there anything to assist the plaintiff as to the contract by what was said on the 1st of May and subsequently? We think not. When the plaintiff was informed by Thomas Hall that £2,500 worth out of one of the Morgans' shares had been reserved for him, the shares had been already purchased, and the consideration for that statement or promise, if it can be so called, had passed. The consideration to be given by the plaintiff—to put the most favourable construction for him on the evidence—was to stay on till the Morgans were bought out. It must not be forgotten that all this time he was in receipt of a salary of £5 a week, and could have left at any time, if he pleased. The so-called promise, therefore, of the 1st May, if made, was purely gratuitous and voluntary, being in return for a past matter only, and as such created no contract. The same may be said of all the subsequent statements, which (if any) can be construed as promises or ratifications at all.

It was contended for the plaintiff (upon the authority of the following passage in Pollock on Contracts, 3rd ed., p. 187, citing *Kennedy* v. *Brown*, *per Erle*, *J.*, 13 C.B., N.S., at p. 740:—"It is said that services rendered on request, no definite promise of reward being made at the time, are a good consideration for a subsequent express promise in which the reward is for the first time defined. But there is no satisfactory modern instance of this doctrine, and it would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth.") that the statement made on the 1st May, 1884, as to the reservation of the £2,500 worth in one of the Morgans' shares, amounted to a subse-

quent express promise, defining for the first time the reward for the services of the plaintiff previously rendered on request. The plaintiff's counsel cited *Bradford* v. *Roulston*, 8 Ir. C.L.R., 468. We prefer the doctrine in *Kennedy* v. *Brown*, but it is not necessary to decide the point, because this case is sufficiently distinguishable from the supposed case put by the text writer, for the reason that the reward, indefinite and uncertain though it was, viz.:—an interest in the mine, was mentioned at the time of the alleged promise—according to the plaintiff, in February, 1884. The statements made by the defendants amounted to no more than promissory expressions, reserving an option as to their performance, which do not constitute a promise, and are not sufficient to create a contract (*Taylor* v. *Brewer*, 1 M. & S., 290; *Roberts* v. *Smith*, 4 H. & N., 315). In our opinion, therefore, there was no evidence of a contract in fact to go to the jury.

Then is there any evidence of a declaration of trust? That was attempted to be established thus:—Plaintiff's counsel contended that the statement made on the 1st May, 1884, by Thomas Hall and D'Arcy, as to the reservation of the £2,500 worth out of one of the Morgans' shares, amounted to a valid declaration of trust, that it was affirmed in August following by Thomas Hall, when he told plaintiff about the intended division of shares, and again in November, 1886, when Thomas Hall and D'Arcy spoke about the £10,000 to be paid to young Fred Morgan which was to be charged upon the share in which plaintiff had his interest. The material part of the statement of 1st May, 1884, was this:—"We have reserved you £2,500 worth out of one of the Morgans' shares. At present they'll be kept all together, until they are paid for out of the dividends, and as soon as a division takes place yours will be handed over toyou free of charge. No one has any writing." It is upon this statement, if any, that the plaintiff must sustain the declaration of trust. The statements of August, 1884, and November, 1886, amount to nothing more than references to a trust (if any) already created, and are clearly not evidence of any new declaration of trust.

Now no doubt a trust of personalty may be created by a parol declaration, and will be perfectly valid, even when voluntary. It is too late in the day to question the law in this respect, established by decisions which Lord Chancellor Cranworth, in *Jones* v. *Lock*, L.R., 18 Eq., 25, has termed "unfortunate." But to what extent must the declaration go? "There must be an expression of an intention to become a trustee," per Jessel, M.R., *Richards* v. *Delbridge*, L.R., 18 Eq., at p. 15. Again at page 14—"he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning." In *Warriner* v. *Rogers*, L.R., 16 Eq., 340–348, Vice-Chancellor Bacon says, "The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be that the donor, grantor, or whatever he may be called, should have absolutely parted with the interest which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest."

Further, the matter of the trust must be specific—it must be certain, defined and allocated. In all the cases upon the subject, that is clearly shown; and in each case the question is, "Has there been a declaration of trust or not?" Can we say from the evidence that Thomas Hall and D'Arcy, or either of them, speaking for themselves (there was no evidence that they had the authority of the other two defendants to make any such declaration) intended there and then to deprive themselves of all control over that share in which the plaintiff claims his interest, and that an action might have been immediately maintained by the plaintiff to have his interest in the share forthwith transferred to him?—for that is what the plaintiff must establish. It is manifest that we cannot, since

part of the very declaration relied on shows that something further had to be done—it attaches the condition that the shares are to be kept all together until paid for out of dividends, and not handed over until so paid for and divided. An element of uncertainty is at once introduced, since it was possible that there might never have been dividends enough to pay for the shares.

Then again, the plaintiff was to get his interest in one of the Morgans' shares, which one was not stated at that time, and one of them subsequently, (November, 1886) mentioned as the one was then the property of an infant, and the contract of purchase of that share was not validated till the infant's majority in December, 1886. The specific identification and allocation of the matter of the trust—the ear marking so to say—required by equity is entirely absent here. Both upon principle and authority, therefore, we are of opinion that there was not a valid parol declaration of trust; (*Jones* v. *Lock*, and *Richards* v. *Delbridge*, before cited, and *Breton* v. *Woollven*, 17 Ch. D. 420). For obvious reasons, we are not inclined to carry the principle in the slightest degree beyond the decided cases. As the law even now stands, it is capable of very dangerous application. It is important to observe in this case, however, that the plaintiff did not at the trial rely upon the declaration of trust as being made voluntarily. It was contended for him that these statements, had reference to the contract, and that the interest in the share promised was the payment for his services in continuing on at the mine, and the declaration was made as an admission of liability in respect of the contract. It would be sufficient therefore, to say that to establish a voluntary declaration of trust was not the plaintiff's case, since the intention to make a voluntary declaration of trust was negatived by the case made by the plaintiff, which was in substance to have the defendants declared trustees of the remuneration which he had earned by his services in pursuance of a contract. Upon the second ground therefore, we think the plaintiff's case has failed.

But assuming that there was evidence either of a contract or a voluntary declaration of trust, there remains the question whether the subject matter of it related to land or an interest in land. If so, the *Statute of Frauds* is a bar to the action on the contract, inasmuch as the plaintiff has produced no agreement, memorandum or note, to satisfy the requirements of the Statute, and in like manner the declaration of trust, not being manifested and proved by writing, is by force of the Statute void.

Now what are the facts on this point? By the contract the plaintiff was to get an interest in the mine, either as partnership property, or as a co-owner of land used for the purposes of that partnership. At the time when the alleged contract was made, the mine was being held and worked by the Morgans and defendants under the agreement of 6th June, 1883, [Exhibit No. 4.] No change in the condition of the property other than the purchase out of the three Morgans' shares was made, until the 16th June, 1884, (even if any was then made) when the agreement [Exhibit No. 15] was entered into between Frederick and Thomas Morgan, the defendants and Ferguson. The contract, if made at all, was made not later than 1st May, 1884, and while the agreement of 6th June, 1883, was in force. That agreement was made between the four Morgans of the first part, and the four defendants of the second part. It recites that the parties are jointly possessed of or interested in certain gold mining claims registered in the Warden's office at Rockhampton, and known as Morgan's Mount and Morgan's Mount West, and so on, and of a freehold selection of 640 acres adjacent thereto, and of a machine site area and quartz crushing machinery, buildings, plant, &c., thereon, all of which claims, lands, areas, machinery, &c., are and stand in the joint names of Frederick Morgan and Thomas Hall. And that the parties have agreed that the property as described shall (as to one moiety or half part thereof) belong exclusively to the parties of the first part as tenants in common, and as to the other moiety or half part thereof, to the parties of the

second part as tenants in common. It provides for the working of the property at equal cost of the parties by Frederick Morgan and Thomas Hall, who are empowered to appoint, pay, and dismiss all employés required, the keeping of accounts and proper books, and a banking account, and for a quarterly balance sheet, and for the appropriation of the receipts and profits for current expenses, the creation of a reserve fund, and the payment of the balance in equal parts to the parties *pro rata*. If further capital is required, it is to be contributed by the parties in equal moities. The managers are prohibited from selling the property, and neither of the parties may sell, or agree to sell, transfer, or hypothecate their share or interest in the property, without the consent in writing of Frederick Morgan and Thomas Hall, under penalty of forfeiting their interest to the other parties, and it provides that the agreement and the mining partnership thereby created, shall be in force for two years.

We think upon the true construction of this instrument, it must be held that the parties were co-owners of land in undivided moieties, which they intended to work together as a mining co-adventure for two years, and that the property did not become personalty by force of the agreement. The interests of the parties in the property being described by the agreement as joint tenancies in common of undivided moities, and neither of them having the right to have the property sold and the proceeds divided, it seems plain that at the end of the two years, in the absence of any fresh arrangement, there would have existed a right to a partition of all the property, but beyond question of the freehold; see *in re Hulton*—*Hulton* v. *Lister*, 5 Times Law Reports, p. 737, North, J. Conceding all but the freehold to be personalty there was a mixed estate, partly real and partly personal, and if any part of the whole was land, the Statute would of course apply. It is not necessary to decide what was the effect of the agreement of the 16th June, 1884, as the facts upon which the plaintiff's claim must, if at all, be established either as to making of the contract or the declaration of trust, occurred before that instrument (made between different parties too) came into existence.

It was strenuously contended for the plaintiff that conceding the mine to be land in fact, and therefore at common law land, yet it being as was contended partnership assets by reason of the equitable doctrine, it was in equity, or it became in equity, personal property. This rule undoubtedly exists as between partners, but it has not been shown that it has ever been applied to the case of a partner contracting with a third party in respect to property of or interests in the partnership, (which would to make a binding agreement, require to be conformable to the *Statute of Frauds*,) so as to defeat the express provisions of that Statute. On the contrary, it has been held that a contract for a partnership in a mine belonging to one of the contracting parties which would give the other party an interest in the mine, is within the Statute; *Caddick* v. *Skidmore*, 2 De G.F. & J., 52; 27 L.J., Ch., 153: a case quite in point here.

Besides, this general rule is subject to be abrogated by agreement to the contrary. Partners may stipulate that the land of the partnership shall not be treated as personal estate; *A.-G.* v. *Hubbuck*, L.R. 13, Q.B.D., 275. But it must be clearly established that the land is partnership assets, *A.-G.* v. *Marquis of Aylesbury*, L.R. 16 Q.B.D., 408; otherwise the rule has no application. Land may be used for partnership purposes and nevertheless may retain its character of realty. *Rowley* v. *Adams*, 7 Beav. 548, and it is not of course that property used by the partners for partnership purposes, is partnership property.

We think the following passage from Lindley on Partnership, 5th edition, p. 347, founded on *Steward* v. *Blakeaway*, L.R., 4 Ch. 600, 6 Eq. 479, expresses very nearly the position of the parties to the agreements of September, 1882, and June 1883.

"If land belongs to all the partners as tenants in common, but not as partners, and that land is used by them for partnership purposes, but is nevertheless intended to remain vested in them as

tenants in common, and not to form part of the assets of the firm, the share of each partner will be real and not personal estate." This we think upon a consideration of the agreements of the parties was their intention. Consequently, the plaintiff has failed to shew a valid contract or declaration of trust, giving him an interest in that real estate within the *Statute of Frauds*.

The judgment of the Court is that judgment of non-suit be entered. The defendants to have their costs of this motion and of the action.

Solicitors for plaintiff: *Chambers, Bruce & McNab.*

Solicitors for defendants: *Wilson & Newman-Wilson*, and *Rees R. Jones & S. Jones*, Rockhampton.

NOVEMBER SITTINGS OF THE FULL COURT.

REGINA *v.* JOHN DEANE.

The Charters Towers Waterworks Board was a joint local authority consisting of six members, constituted under *The Local Authorities (Joint Action) Act of 1886*. By section 15 they were required to elect one of their number as president at their first meeting in each year after the month of February. B was a member and the president of the Board for 1888, and in February, 1889, had ceased to be a member. He was present at the meeting held in that month to elect the president for the ensuing year, and claimed the right to act as president at the meeting. D and T were the candidates for president. He did so act; and, upon an equal division of votes for the two candidates, he gave his casting vote in favour of D, who was declared elected. On a motion for a writ of *quo warranto*—

Held, that there was nothing in the Statute to limit the authority of a president, except the election of his successor; and that, though about to retire, he had a vote and a casting vote.

Held, that the respondent was duly elected.

MOTION to make absolute a rule *nisi*, granted by the Court on the 1st October, for a writ of *quo warranto* calling upon John Deane to show by what authority he claimed to exercise the office of president of the Charters Towers Waterworks Board.

The Board was a joint local authority under the provisions of *The Local Authorities (Joint Action) Act of 1886*, and consisted of six members, who were required by section 15, at their first meeting after the month of February in each year, to elect a president, who should "hold office until the "president for the next following year is elected." Three of the Board for the year 1888 were aldermen of the Charters Towers Municipal Council, and were elected for one year; one of them was Maurice Barnett, the mayor of Charters Towers, and he was elected president of the Joint Board. At the end of their year of office Barnett and his brother boardsmen retired, and others were elected in their places on the Joint Board. A meeting was called to elect a president for the ensuing year, and John Deane and Benjamin Toll were nominated for the office. Barnett was present, and acted as president of the meeting. The votes were equal for each candidate, and Barnett gave his casting vote in favour of Deane, who was declared duly elected. Barnett then retired from the meeting, and ceased to act further.

Sir S. W. Griffith, Q.C., Mansfield with him, for the relator, Joe Millican, at the October Sitting of the Court, obtained the rule *nisi*.

Sir S. W. Griffith, Q.C., Jodrell with him, now appeared to move the rule absolute; *Real, Byrnes* with him, to show cause.

Real: The 15th section of *The Local Authorities Act of 1886* provided for the out-going president continuing in office until his successor was appointed. Referred to sect. 10, subsect. 5, of the Statute. Under the Act it was not necessary that the president should be a member of the Board. *Reg. v. McGowan*, 11 Ad. & E., 869; *Reg. v. Maddy*, p. 878.

Griffith, Q.C.: The Legislature had provided for the election of the president by the majority of the members present. Deane had not been elected by them, but by Barnett, who was not then a member. The construction of subsect. 3 of sect. 10 was inconsistent with that of sect. 15. Six persons only were entitled to vote here. It was necessary for someone to preside; in some cases the permanent clerk presided for the election of a president. But it did not follow that the executive officer on such an occasion should have a

vote. The Court would only say the retiring president had a part in the election of his successor, if the words of the Statute would not admit of another and reasonable construction. That was not so here. The president here had ceased to be a member; and he was therefore not entitled to perform the duties of a member. Deane had not been duly elected.

LILLEY, C.J., delivered judgment:—

The Charters Towers local authority in 1888, elected one Barnett as a representative on a joint local authority. They elected him for the period of one year. In 1889, at a subsequent election they did not elect him, and he ceased to be an elected representative on the joint local authority. But, in the meantime, after his election in 1888, he was elected president of the joint local authority, and he continued president, apparently for the whole period of the year up to 1889, when he ceased to be an elected local representative. After the year had expired—that was in the month of February, 1889—the joint local authority met for the purpose of electing a president, and he was present, and claimed the right to preside at that meeting. He furthermore voted, and there being an equality of votes, gave his casting vote for the election of Deane. Now, if the matter depend upon the plain construction of section 15, it would appear that Barnett was entitled to hold his office of president until the president for the following year was elected. That is the plain language of the statute. If he held the office of president, he held it for all purposes. In section 15 the president was described as the executive officer of the joint board, who should preside at all meetings at which he was present. Therefore, until the election of his successor, he had a right to discharge the executive duties of the office, and to act as president at the meetings of the local board. Besides the functions of an executive officer—whether looking after works or seeing that by-laws were enforced—a further function was given to him as president, by section 15, which was in the event of an equal division of votes to give a casting vote. I am unable to see anything in the statute which makes a dividing line between his office, when he filled it by virtue of election, and when he vacated it by the expiration of his term. The Act says he is to be president until his successor has been elected. This term ceased when the next president was elected. If there was not a majority for the election of a new president, this section pointed out a way of escape by giving the retiring president the power of giving a casting vote. I do not see anything in the statute to limit his authority as president, except the election of his successor. There is no express provision that the president need be an elected representative, and there is no provision stating that when he ceases to be an elected representative he ceases to be president. So far as I can see, there is nothing to take away from him his authority except the appointment of his successor. There is a curious portion of subsection 3 of section 15, to which my attention has just been called. According to that provision the president or chairman of the day has a vote. Now if he was an elected representative, that express enactment would not be required. The section further goes on to say that under certain circumstances the chairman shall have a casting vote. It is a clear rule, unless there is something inconsistent, to adhere to the written wording of the Act itself. If any grave difficulty has been created, it is the act of the Legislature itself. The Court is dealing with the actual language of the statute itself. I can conceive that it may be in some way convenient that the president shall continue in the discharge of his duties until his successor has been elected; but I cannot see that section 10, with its various subsections, in any way militates against this construction of the Act. Under all the circumstances, the rule must be dismissed.

HARDING, J., concurred.

Rule dismissed accordingly.

Solicitor for relator: *Hellicar*, agent for *Marsland & Marsland*, Charters Towers.

Solicitor for respondent: *Bunton*.

Ante p.

BRISBANE CIVIL SITTINGS.

LILLEY, C.J. 11th, 12th, 13th, 16th, and 19th December, 1889.

LANCASTER *v.* FRASER.

Costs—Breach of Duty as Agent—Charges of Fraud—Plaintiff's Costs where Charge not reckless.

Plaintiff brought an action as executor of an estate for breach of duty as agent for the deceased testator, and to recover secret profit. The jury brought in a verdict for plaintiff, but did not find that defendant had knowingly concealed from his principal the facts of the transactions connected with the secret profit.

Held, applying *Parker v. M'Kenna*, 10 Ch.D., 96, that as a charge of fraud was not wantonly and recklessly brought, plaintiff was entitled to his general costs of the action, and of the issues on which he succeeded.

ACTION to recover amount of secret profit alleged to have been made by defendant as agent on sale of land, and for damages for breach of duty; tried before The Chief Justice, at the Brisbane Civil Sittings, December, 1889.

Plaintiff was sole executor of the will of his father, John Lancaster, who had employed defendant as his agent for the sale of a block of land of about 40 acres, the property of John Lancaster. It was alleged that, having represented to Lancaster that he could not sell it for more than £9,000, the defendant had sold it for that sum to W. H. Kent; that before such sale he had agreed with Kent to join him in the purchase, and did actually join Kent in the purchase from Lancaster; that before the sale, also, they had agreed with the Queensland Deposit Bank to sell them the land for £12,000; that immediately after their purchase from Lancaster, defendant and Kent sold 40 acres for £12,000 to the Queensland Deposit Bank; that defendant had concealed from Lancaster his interest in the sale of the land in question; that he had retained as his share in profits on the resale £1,500 out of the purchase money; and that he had been guilty of a breach of duty in not obtaining the best price for the land for Lancaster.

After hearing the evidence, the jury found that (1) defendant was agent for sale for Lancaster; (2) he did not knowingly misrepresent the value of the land to Lancaster; (3) he was a joint purchaser with Kent; (6) he made a profit on the resale, without the knowledge of Lancaster, while he was his agent; (10) Kent, before the sale by Lancaster, agreed to sell to the bank for £12,000, with the defendant's knowledge; (11) defendant had retained £1,500 for his own use. To the following questions they returned no answers:—(4) Had he agreed with Kent, before sale by Lancaster, and without Lancaster's knowledge, to become a joint purchaser with Kent? (5) Did he knowingly conceal from Lancaster that he was a joint purchaser with Kent? (7) Did he negligently lose Lancaster the profit on the resale to the Bank? (8) Did he deprive his principal of £3,000 profit on resale for the benefit of himself and Kent?

There was a further issue raised on the pleadings—that defendant had fraudulently obtained from Lancaster a transfer to himself of 1r. $5\frac{9}{10}$p. of land, portion of the land sold by Lancaster, which was over and above the 40 acres sold to the Queensland Deposit Bank. The jury found that defendant obtained this transfer with Lancaster's knowledge.

The learned Chief Justice gave judgment for plaintiff for £1,500.

Sir S. W. Griffith, Q.C., Feez with him, appeared for the plaintiff; *Real, Byrnes* with him, for the defendant.

Real applied for costs, on the ground that fraud had been alleged and not proved; or that defendant should have the costs of those issues on which plaintiff had not succeeded, and that plaintiff should not have costs of the case on which he had succeeded. He cited *Parker v. M'Kenna*, 10 Ch.D., 96; this came within that case.

Griffith, Q.C., contra: The costs should follow the rule; *Parker v. M'Kenna* should be distinguished from this case.

C. A. V.

On the 19th December, 1889, His Honour delivered judgment as to costs as follows:—

LILLEY, C.J.: In this case the defendant had a verdict against him, and a judgment against him

too for £1,500, in respect of money representing a secret profit which he had made in breach of his duty as agent for John Lancaster, deceased. The plaintiff sued as the representative of his father, as his executor; and of course, being in ignorance of the actual transaction out of which the action arose, he was dependent for the information on which he proceeded upon other persons. Much must be allowed for that. He brought his action in respect of a secret profit, and that was opened to the jury; no other case was opened to the jury. A charge of fraud arose during the hearing; the gravamen of that charge was that defendant had represented to old Lancaster that his property was worth no more than £9000. Upon that charge of fraud the jury did not find either way. Of course defendant is entitled to his costs of that issue, in that plaintiff failed to satisfy the jury that there was fraud in his dealing. The question is whether the rule in equity as to costs is to be applied here—that is, that the defendant is not only to have his costs of those issues allowed to him, as he will have of course, but whether I am to go further, and to inflict the penalty on plaintiff of depriving him of the costs of the issues on which he succeeded. Before I can do that, the plaintiff must be brought clearly within the principle on which the equitable rule rests, and the punitory power of depriving him of costs is exercised. That principle is clearly and broadly stated by Lord Justice James in a case to which I have been referred—*Parker v. M'Kenna*, L.R., 10 Ch., 96. If a man makes extravagant, wilful, malicious allegation against another party, and fails to prove it, why then the Court has power to deprive him of the costs of those he has succeeded upon as well as of that allegation. Lord Justice James says at p. 125—

It is not because a person has made himself liable to proceedings in equity or proceedings at law, that the adverse litigant is entitled to make the Court the place, and the proceedings of the Court the means, by which personal spite or party hostility is enabled to indulge itself in unfounded aspersions upon character. In my opinion that has been done here.

Now, in my opinion, that has not been done in this instance. There is not the shadow of proof that Lancaster, the executor, was moved by any other feeling than a desire to recover the secret profit which this agent had made in breach of his duty. In the case to which I am referred, the Court were of a different opinion; they thought there had been spite or hostility indulged.

Unfounded aspersions have been wantonly and recklessly made, and the consequences of that is that this Court is obliged to give effect to what it has so often said it would do—make persons so dealing with the proceedings of this Court pay, and pay fully, in costs for it. I am of opinion, therefore, that the plaintiff must pay the costs of so much of the proceedings as the Lord Chancellor has pointed out; and that he has so mixed that up with the rest of the suit that he has forfeited, in my opinion, his title to the costs which he otherwise would have been entitled to receive.

Now, there is no pretence for saying here that the plaintiff was moved by any personal spite or hostility, or that he wantonly or recklessly made the charge. He brought the suit in his representative character, upon such information as he had been able to obtain. It has been found on ultimate enquiry that defendant made a personal breach of duty and a personal profit, and I will not disturb the usual rule as to costs. The plaintiff is to have his costs of the issues on which he succeeded and general costs of the action; and the defendant is to have costs of the issues upon which the minds of the jury were in a negative state.

Solicitors for plaintiff: *Hart & Flower.*

Solicitors for defendant: *Hellicar.*

LILLEY, C. J. — 9th and 20th Dec., 1889, and 24th Feb., 1890.

M'CULLAGH *v.* SMITH.

Slander—Damages—Verdict for Plaintiffs—Uncertainty of Person Slandered—Judgment for Defendant.

S. said to M., of her two daughters—One of your daughters gave birth to an illegitimate child. There was no evidence to fix suspicion on either of them, and nothing to show that S. specially referred to either. The jury found that the words were spoken; that they were defamatory; that there was no evidence as to which of the plaintiffs the words were spoken of; and that they were not spoken of both; and gave a verdict for plaintiffs.

Held, that, the defendants were entitled to judgment, on the ground that the person scandalized must be certain, so that, either from the words themselves, or from circumstances appearing in proof, the jury can say of which one they were spoken. *James v. Rutlech*, 4 Rep. 17a; *Jones v. Davers*, Cro. Eliz., 497, and 1 Rol. Abr. 74; and *Wiseman v. Wiseman*, Cro. Jac., 107, followed.

ACTION for damages for slander.

Plaintiffs were two young unmarried women, who sued by their father; defendants were husband and wife The slander had been spoken by the wife. Plaintiffs' case, which was proved, was that the female defendant had uttered the slanderous words; that, referring to a child of plaintiffs' brother and his wife that had died, she had said to their mother—"that was not their child at all; it belonged to one of your daughters, and I meant to ask you which of them it belonged to; that later she had said to the mother and another brother of plaintiffs', that it was said in the Y.M.C.A. rooms that "the Misses M'Cullagh were not the angels they appeared to be, as one of them had given birth to an illegitimate child," which the married "brother had owned to hide their shame." There was no evidence to indicate that either of the plaintiffs was particularly meant.

Feez appeared on behalf of the plaintiffs, and *Lilley* on behalf of the defendants.

The jury found that (1) the words were spoken; (2) there was no evidence of which of the plaintiffs they were spoken; (3) they were not spoken of both; (4) they were defamatory; (5) they were not spoken in good faith, and without malice; (6) they were not spoken in confidence, with a view to give the mother information which it might be useful to the plaintiffs for her to know; (7) they were spoken on an occasion when the plaintiffs' characters were likely to be injured thereby; (8) £25 damages.

Feez moved for judgment for plaintiffs for £25.

Lilley moved for judgment for the defendants.

It was appointed that, on a later day, counsel should mention authorities in support of their applications.

On 20th December, accordingly—

Lilley cited *Jones v. Davers*, Cro. Eliz., 497; 1 Rol. Abr., 74; and *Wiseman v. Wiseman*, Cro. Jac., 107, and referred to *Odgers*, p. 132; these cases were cited by him at the hearing. He also cited *Girand v. Beech*, 3 E.D. Smith (N.Y. City Com. Pleas); *James v. Rutlech*, 4 Co., 17a.; and *Falkner v. Cooper*, Carter's Rep., 55. The slander was of an uncertain person; a stigma was not fixed distinctly to either plaintiff. There should be judgment for defendants.

Feez, contra: Both plaintiffs were brought under suspicion, and both or either of them could sue; *Anon.*, 1 Rol. Abr., 81; *Ingalls v. Allen*, 1 Breese, 233; both cases were cited in *Odgers*, p. 131.

C. A. V.

On the 24th February, 1890, the learned Judge gave judgment as follows:—

LILLEY, C.J.: This was an action for defamation, brought against James Smith and wife by two girls. The defamatory words were uttered by the wife—first to Mrs. M'Cullagh, the mother of the two girls, and then to her and her son; they were not proved strictly as alleged. Upon every occasion the words were uttered, the same limitation was made—that one of them had given birth to an illegitimate child. Nowhere is any language used that would indicate to which of the girls the misconduct was imputed. I have gone very carefully over my notes, and have thought the matter over very much indeed; and nowhere do I find any circumstance to indicate to which of the girls the misconduct was imputed. The jury found, and I think they had no other course open to them, that the words were spoken; but that there was no evidence as to which of the girls they were spoken of, and that they were not spoken of both. I think there can be no doubt of the perfect reasonableness and accuracy of the findings. It could not be spoken of both, simply because two girls could not have one and the same child. That is obvious; and really there is no circumstance that would enable me to say they were spoken of a particular Miss M'Cullagh. I may say here at once, that there is not a shadow of suspicion on

either of these girls. Neither their mother nor brother believed the words; nobody appears to have believed the words. Mrs. Smith herself says she did not believe them; but the jury found that she spoke them. There is no doubt that a woman who would say that, even to the mother, has a loose and mischievous tongue, and if my judgment could go with my sentiment, I would give judgment for the plaintiffs. But I must say the cases are all against the plaintiffs. The rule, as laid down in Coke, in *James v. Rutlech*, 4 Co., 17a (Thomas & Fraser's Ed., vol. ii., p. 305), is that the person who is scandalized must be certain; that is, either from the words themselves or from circumstances appearing in proof, the jury should have been enabled to say they were spoken of Emily M'Cullagh or they were spoken of Lily M'Cullagh. But there is not the least evidence, as I have said, on which the jury could have delivered a finding of the kind. All the English cases follow that case of *James v. Rutlech*. We have a case like this—If a man say, "my brother, or my enemy" is perjured, and hath only one brother or one enemy, such brother or enemy can sue; but if he says, "one of my brothers is perjured," and he hath several brothers, no one of them can sue; without special circumstances to show to which one he refers, no action will lie; *Jones v. Davers* and *Wiseman v. Wiseman*. I am citing cases mentioned in *Odgers on Libel and Slander*, pp. 131–2. There are other cases. The leading case is—A man says to a master, "one of thy servants hath robbed me;" in the absence of special circumstances, no one could sue, for it is not apparent who is the person slandered—that is the case of *James v. Rutlech*. My friend, Mr. Feez, referred me very properly to two other cases, which are mentioned in *Odgers*, at p. 131. The first is—If defendant says A or B committed such a felony, both are brought into suspicion (1 Rol. Abr., 81). The other case, to the same effect, is reported in 1 Breese, 233—a reporter of the Illinois Supreme Court. I cannot find that case anywhere but here; those reports are not in our library. Another case is *Falkner v. Cooper*, Carter, 55, where the majority of the bench was in favour of the principle in *James v. Rutlech*. Then another case, which is cited in *Odgers*, 131, is as follows:—"You or Harrison hired one Bell to forswear himself;" Harrison can sue; *Harrison v. Thornborough*, 10 Mod., 196; Gilb. Cas. in Law and Equity, 114. This shows the evil of these text books. I have this case here in *Gilb. Law and Eq. Ca.*, 114. There are two branches of libel in the case. The first was—"Harrison got a poor fool to forswear himself;" there Harrison is distinctly mentioned. Then come the words, "You or Harrison hired one Bell to forswear himself." The court held that the first part rendered him liable to be sued; but on the second part they held no action would lie. I cannot discover any record of the first case, given as *Anon.*, in 1 Rol. Abr., 81. I cannot find the Illinois report, and in the *Harrison* case the decision is right in the books and is wrongly cited in *Odgers*.

Well, it is a hard case, because there is no doubt it is calculated to cast a serious shadow round the character of these girls. But I am bound by the law. If I were ruled by sentiment, I would be inclined to make them some compensation at the hands of the woman whose tongue appears to have been very mischievous. But, if I depart from the English rule, I do not know where the action would end. Then a man might say that all the people in Brisbane, except one, were thieves, and we should have 65,000 actions brought against him. We have only to push the proposition to its extreme limit to show its absurdity. If this man had had twenty daughters, all might have sued. Then the damages go to the father, not to the daughters. Which of the girls should take it? If you put the money down on the table, and asked which of the girls would take it up, it is not likely that either of them would take them. Then if you had asked the jury how the girls should divide the money, the jury could not have said. Then there should be no damages. I am bound to say that there should have been some remedy at our law for these words. Our ancestors were rough, but

they were just. They would have sent this lady to the ducking-stool for a scold and a scandalmonger; they would not have allowed an action to go against her husband, who is innocent of the slander.

Under the circumstances, I am bound to give judgment for the defendants. I think it is a great pity here that the parents were so impulsive as to bring the action. There is nothing to show that the girls were not most exemplary, the words were spoken only to their own relations, and a wise father and mother leaving the thing alone, the words would not have done them any real harm.

Judgment for the defendants.

Solicitor for plaintiffs: *Corbett.*

Solicitors for defendants: *Wilson & Newman-Wilson.*

DECEMBER AND MARCH SITTINGS OF THE FULL COURT.

SPARKS *v.* HARPER AND CO.

Trade name—Label—Probability of deception—Intention to deceive.

In an action for damages and for an injunction restraining defendants from using a certain label for "French Coffee," the jury found that defendants' label was a fraudulent imitation of plaintiff's, that the label and defendants' dealing with it was calculated to lead incautious persons into the belief that defendants' "French Coffee" was that manufactured by plaintiff, and that defendants so dealt with it for that deceitful purpose. There was evidence both ways before the jury on all these points. There was expert evidence that inexperienced persons would be likely to be deceived by the defendants' label into believing it was plaintiff's.

Held, that the real question was not whether experts would be deceived, but whether the ordinary run of purchasers would be likely to be deceived by the defendants' label.

Held, that, as there was evidence to warrant the conclusion that such persons would be deceived, the verdict of the jury should not be interfered with.

As to intention to deceive, the colours on defendants' label being like those on plaintiff's, the absence of defendants' name from their label, and the statement by their travellers that, as "French Coffee" was selling so well, they were going to introduce a brand of their own,

Held, to be evidence of intention to deceive.

MOTION to set aside findings of jury in favour of the plaintiff, and to enter judgment for defendants or for a new trial, on the grounds that the findings were against evidence and the weight of evidence.

Plaintiff and defendants were both merchants carrying on business in Brisbane, and both prepared and sold wholesale pure and mixed coffees. In 1885 plaintiff began to manufacture and had continued to manufacture, by a secret process, a mixture of coffee and chicory, which he called French Coffee. It was put up in tins covered with a coloured label bearing the words: "Finest French Coffee, as prepared and used in the principal towns of France—Café Parisien. Sole holder of the receipt in Queensland, B. Sparks, Brisbane." The colours on the label were red, white, and blue, in parallel stripes, two stripes being broad, red and blue, the remainder being narrow, in red and white. This mixture plaintiff advertised largely, and he had sold large quantities of it. He had registered the label as a trade mark.

Defendants, who were carrying on business as millers and tea, coffee, and spice merchants in Melbourne, Sydney, and Adelaide, as well as in Brisbane, in July, 1889, introduced a brand of coffee, which they called "Zouave Imperial French Coffee and Chicory." This mixture was in tins about the same size as plaintiff's, and wrapped in a label bearing the foregoing words and a picture of a French Zouave soldier. The lettering and the picture were in the colours red, brown, and blue, on a white ground; there were no stripes on the wrapper. Neither defendants' nor any other person's name was on the tins.

On 29th July, 1889, *Real*, *Lilley* with him, applied to LILLEY, C.J., for an interim order, until the hearing of the action, to restrain defendants from using their trade mark, on the ground that it bore the words "French Coffee." This was refused on the ground that the words were not capable of registration; but was granted on the ground that plaintiff appeared to have had sole use in Queensland of this trade name. The motion and judgment are reported at pp. 158–160, *supra*.

The case was tried before LILLEY, C.J., and a jury of four, at the November Civil Sittings.

Power, *Real* and *Lilley*, appeared on behalf of plaintiff; *Sir S. W. Griffith, Q.C.*, and *Feez* for the defendants.

A great deal of evidence was taken on both sides. Plaintiff's evidence showed that during a visit to England he found that French Coffee was sold by several merchants under a red, white and blue label, and that there was a profitable trade. On his return he had introduced the mixture of coffee and chicory into Queensland under the name of "French Coffee," because it was a new name in the local market; that he had made a profitable sale of his mixture during five years, and that the name of "French Coffee" became identified with his own. His sales and profits had decreased since the introduction of defendants' French Coffee, at the beginning of July, 1889. It also came out in cross-examination that he made up and supplied a large quantity of "French Coffee" to Quinlan, Gray & Co., merchants, under a label of similar form to, but of different colours from his own, and without his name. Witnesses for plaintiff gave evidence of a ready sale of plaintiff's coffee, which was known as "French Coffee," and asked for by customers by that name. Customers asked for "French Coffee," not for Sparks', by name, when they wanted Sparks' French Coffee. No other French Coffee was known in the market, except plaintiff's, until defendants brought theirs out. Defendants had been selling coffee under other names—"Star," "Eagle," and "Harp." M'Conochie, a member of a large manufacturing firm in England, who was travelling all over Australia for his firm, deposed that plaintiff's was the only French Coffee he had seen in Queensland, and that if French Coffee was mentioned, Sparks' was always produced. The experience of his own firm was that colours or trade marks were not important, but the word used was the important matter. They had never changed "Suffolk," their word, but had made many radical changes in colour. Devoy, manager and salesman for Quinlan, Gray & Co., deposed that his firm had agreed with plaintiff to supply them with his French Coffee, the conditions being that it was called "French Coffee" on the label, and did not bear plaintiff's name. His experience was that it was the name, "French Coffee," not the label that effected the sale. When their customers ordered from them, they ordered "French Coffee." Most of plaintiff's witnesses, who were retail grocers, said that when they received orders for "French Coffee," they understood plaintiff's was meant; and that it was spoken of by customers as "French Coffee," not as Sparks'. One witness, Clacher, a grocer, was offered French Coffee by one of defendants' travellers, and would not take it, because he considered they were infringing plaintiff's right. The traveller said "they had been asked for French Coffee pretty often, and they thought they'd introduce it here." Another witness, Watson, manager of the Queensland Agency Co., who were dealers in groceries, deposed that one of defendants' travellers called on him, produced a tin of defendants' "Imperial Zouave French Coffee," and said, "finding French Coffee was selling so well, they were going to start a brand of their own." Witness told him he thought it an infringement of plaintiff's brand. He thought purchasers were likely to be deceived by defendants' brand. When he got orders for French Coffee, he thought plaintiff's was meant. On cross-examination, he said he understood the plaintiff had registered the word "French."

> No one could mistake the one for the other. They could be deceived by the word "French." . . . People don't go by labels, in my experience. The word "French" is the only similarity.

Hockings, a grocer, deposed to a traveller of defendants asking him to buy "a French coffee he was introducing." He was in the habit of buying plaintiff's, and told the traveller he thought "Sparks was the only one that could sell French Coffee." He thought "no one could mistake one label for the other."

Defendants' witnesses gave evidence that "French Coffee" was a well-known term in the trade in England and other Australian colonies; that it was a preparation of "chicory, burnt

sugar, and coffee, if you like." Defendants prepared French Coffee in each of the cities where they carried on business, for sale both by themselves and by wholesale grocers. They had been preparing and selling it for five or six years. They gave each customer a separate label, of his own choosing, and did not put their name on the label. Specimens of the various labels were tendered in evidence. One was the same as the label complained of by plaintiff, except in the colouring, which was all brown, on white paper. There was no name. Coffee under this label had been sold by defendants in Adelaide and Melbourne for two years. It was their practice to sell some goods prepared by them without their name being on the label; other wholesale houses would not care about advertising Harpers' name. One witness, Brandenburg, had known French Coffee as an article of commerce in England; remembered plaintiff's during four or four and a half years in Brisbane; had only *known* it as plaintiff's for two years. He remembered defendants bringing out their coffee. His partner purchased some. In his evidence, on cross-examination, he said—

When I came home I thought it was another quality of Sparks' coffee. I had a conversation with Sparks. I said I thought it was some inferior quality of his. I asked my clerk where the coffee came from, or whose get-up is this? He said it was Robert Harper's.

On re-examination he said—

My partner bought the defendants' coffee while I was away. When I came back I saw the coffee on the shelf. I immediately asked who the maker was.

Griffith, Q.C., in addressing the jury, contended that on the evidence it was shown that French Coffee was no novelty, but a well-known preparation; that there was no dispute about plaintiff being the first to sell it in Queensland, but that he had no exclusive right to the use of the name "French Coffee," or to the sale of the article known by that name; that the defendants had not imitated plaintiff's label, and that they were not guilty of fraud. He cited *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H.L.C., 537.

Real contended that the plaintiff had by the sole use of the term "French Coffee" obtained a certain right to its sole use; and that, to enable defendants to sell it, they must not sell it under a label which would mislead buyers into believing they were buying plaintiff's article. Their label was an imitation of plaintiff's; on it they used the words "French Coffee," and had not printed their own name. They were entitled to the relief claimed.

In summing up, the learned Chief Justice directed that plaintiff had not an exclusive right to the use of the words "French Coffee;" but the defendants must not so use them as to lead the world to suppose their article was coffee manufactured by Sparks. Plaintiff said they were doing so, and that was the question which the jury had to decide. Looking carefully at the two labels—the plaintiff's "French" and the defendants' "Zouave Imperial French"—they could not be confounded. Was the defendants' label such that an incautious person might suppose it covered plaintiff's coffee?

The jury found, in answer to the questions submitted to them by the learned Judge that—

1. The defendants' label was a fraudulent imitation of plaintiff's;

2. The defendants' label was calculated to lead incautious persons to suppose that the article was the "French Coffee" manufactured by the plaintiff;

3. The defendants dealing with the label was calculated to deceive incautious persons into the belief that their coffee was the French Coffee made and sold by the plaintiff;

4. The defendants so dealt with their coffee for that deceitful purpose.

His Honour gave judgment for the plaintiff for (1) an account and (2) for an injunction as prayed.

At the December sittings of the Court, before LILLEY, C.J., and HARDING, J.,

Griffith, Q.C., Feez with him, for the defendants, moved for a rule *nisi* to set aside these findings and judgment for the plaintiff, and to enter judgment of nonsuit or judgment for the defendants, on the grounds that the findings of the jury were not supported by evidence or the

weight of evidence. He cited *Leather Cloth Co. v American Leather Cloth Co.*, 11 H.L.C. 523, 35 L.J., Ch. 53; *In re Leonard & Ellis' T.M.*, 26 Ch.D., C.A., 288; *Liebig Meat Preserving Co. v. Hanbury*, 17 L.T., N.S., 298.

The rule *nisi* was granted.

At the March sittings of the Court, before LILLEY, C.J., and MEIN, J.,

Griffith, Q.C., *Feez* with him, moved the rule absolute.

Power, *Real* and *Lilley* with him, appeared for the plaintiff to show cause.

Power stated the facts of plaintiff's case; the defendants had not shown anything to weaken plaintiff's case. Plaintiff had introduced "French Coffee" into the market, had by various means made it synonymous with his own name, and for over four years had done a profitable trade in it, until defendants, finding the market for it so good, introduced a preparation which they also called "French Coffee," with a label bearing those words, and without their name on it. They were aware that there was no other "French Coffee" in the market except plaintiff's; and they had not adopted proper means for distinguishing their brand from his. He referred to *Lever v. Goodwin*, 36 Ch.D., 1, as an analogous case. Defendants had not branded their article "Harper's French Coffee," or done anything to draw attention to the fact that it was not Sparks'. The rule ought to be discharged, with costs.

Real followed. Defendants had not been able to get a satisfactory sale for their mixture of coffee under other names, and they introduced it under the name "French Coffee," by which a good preparation of plaintiff's had a reputation and a ready sale. Their preparation was under a wrapper bearing the words, amongst others, "French Coffee," and their own name was not upon the wrapper. The colours upon the wrapper were similar to those on plaintiff's, and there was ample evidence that persons were led to believe defendants' was plaintiff's coffee. There was ·inion evidence also that defendants' label would lead incautious or inexperienced persons.

MEIN, J.: Can you give me any additional light on the two first questions? With regard to intention to deceive, I am quite with you.

Real: The name "French Coffee" had become applicable to Sparks'; there was no other preparation under that name in the market. Persons ordering "French Coffee" intended and expected to get Sparks'. Plaintiff did not claim the exclusive use of the term "French Coffee." But defendants came into the field, and avowedly, by their travellers, desired to get some of the favour which purchasers extended to Sparks' preparation, and with that object used those labels, which were calculated to deceive purchasers. *Somerville v. Schembri*, 12 App. Ca., 453; *Laurie v. Baker*, 2 Rep. Pat. Ca., .

Griffith, Q.C., in reply, submitted that plaintiff had launched his case as being entitled to the exclusive use in Queensland of the term "French Coffee," and neither he nor his counsel had been able to get that idea out of their heads. Leave that claim out, and there was nothing in his case. That idea of exclusive right ran through all their evidence; all his witnesses thought plaintiff had a sole and exclusive right to a trade mark and the name "French Coffee." Except that, the only case the plaintiff had was a similarity of labels; yet it was never part of plaintiff's case that anyone had been deceived. Plaintiff himself said they were "something like," and the word he objected to was "French," in Queensland. As to a name, he himself did not put his name on a lot of his coffee—that which he sold to Quinlan, Gray & Co. Everyone of his witnesses who was asked said there was no similarity, and no one would be deceived. Defendants' contention was that the term was one used all over the world, and a man was as much entitled to use it as the terms "Indian Tea," "Chinese Tea," and "Dutch Cheese." Plaintiff got his idea from English traders, and he had frightened everybody for four and a half years by improperly getting that common name registered as a trade mark. *In re Hanson's, T.M.*, 37 Ch.D., 112, referred to, it was the very trade mark that plaintiff seemed to have got

his from. There was no doubt that defendants could make the same mixture as his, and as was sold all over England, and call it "French Coffee."

MEIN, J.: Yes, if you put it before the world in a way which will not mislead and deceive the public.

Griffith, Q.C.: Plaintiff himself said that he would not be deceived by the label; Brandenburg asked whose it was, and thought it might be another and inferior brand of Sparks'; and against that plaintiff's witnesses all say they were not deceived.

MEIN, J.: I think the jury might fairly conclude that defendants intended to interfere with plaintiff's trade.

Griffith, Q.C.: This was not an action to restrain defendants from interfering with plaintiff's reputation by selling a worse coffee than his. Admitting that the defendants wanted to divide the trade in French Coffee with plaintiff, there was no harm in that, as long as they did not use an unlawful means therefor. Nor was his being the only person who had sold "French Coffee" for some years in Queensland, the same thing as being the only person who had the right to sell it there. Defendants had not done one act beyond the use of the word "French" to induce persons to buy their coffee instead of plaintiff's. They never represented by any act that their article was plaintiff's; and they had the same right as plaintiff to use the word "French." To make this case the same as *Lever v. Goodwin*, defendants should have used the same wrapper as plaintiff, but put "Harper" at the bottom, instead of "Sparks." In *Somerville v. Schembri* there were *differentia* in the label, which were not considered likely to prevent persons being misled. Here, what rule of law could the defendants be said to have infringed? *Liebig v. Hanbury* and the *Leather Cloth* case, at 543 and 535, referred to. Plaintiff had a monopoly of the market in fact, though not in law; the wrong done was therefore *damnum absque injuria*. *In re Leonard & Ellis' T.M., Valvoline case*, 26 Ch.D., 288, referred to.

LILLEY, C.J.: The jury said they were running their coffee fraudulently as plaintiff's; the question now is—were they or not?

Griffith, Q.C.: The case is the same as if, when plaintiff began to sell "French Coffee," defendants had begun also. Plaintiff's case was that he had acquired a *de facto* monopoly for four and a half years. Yet he made a lot of French Coffee, which was sold in large quantities by another firm, without his name. Plaintiff has no right to sell "French Coffee" without his name, if defendants have not a right. Defendants are wholesale dealers, who sell to wholesale and retail dealers. Unless defendants had done something unlawful, plaintiff had no case. What is the resemblance between the labels? The colours are not the same; the lettering is not alike; the words are printed differently. Plaintiff's label was stripes, red, white, and blue, and the leading words were "French Coffee." That was not so in defendants' label. The jury were clearly not able to draw the distinction laid down by Lord Kingsdown in the *Leather Cloth* case. There was no evidence in the case except these two labels; that the word "French" might mislead; and that the plaintiff and his witnesses thought he had the exclusive right to that word. Defendants were free to use the words "French Coffee" alone; yet they added "Zouave Imperial" above and "and chicory" below. They were not bound to print "Not Sparks's Coffee" across the label, nor their own name upon it. Even granting that there was fraudulent intention, that did not matter, if defendants had done nothing unlawful. Lord Selborne had said it was on plaintiff to prove liability to deceive; all the evidence here was that defendants' label was not liable to deceive—only the word "French." Yet the jury had ignored the evidence, and given a verdict for plaintiff *mero motu*. They had by their verdict said that a state of things proved by the plaintiff, and not sought to be upset by the defendants, did not exist.

The judgment of the Court was delivered by—

MEIN, J.: The learned Chief Justice, who tried this case below, directed that the plaintiff was not entitled to the exclusive use of the expression

"French Coffee." It was not contended that the direction was inaccurate, nor has it been contended here that the plaintiff is entitled to be sole vendor of the article known in commerce as "French Coffee." The learned judge, however, submitted certain questions of fact to the jury. These questions were answered to the effect that the article vended by defendants, called "Zouave French Coffee," was a fraudulent imitation of plaintiff's article, which he called "French Coffee," and that it was so got up as to be calculated to lead incautious persons to suppose that the article manufactured by defendants was the article prepared by the plaintiff; and that the defendants so dealt with their coffee for the purpose of deceiving. The question, at the best, was really one of fact for the jury. The defendants have appealed against their decision, and seek to set the verdict aside on the ground that there was no evidence before the jury to support their verdict. In dealing with applications of this description, it is the invariable practice of this Court not to interfere with the verdict of a jury, unless it can be shown that their decision was manifestly perverse, or that there was no reasonable evidence on which the findings could be based. Applying that rule here, let us see what evidence the jury had before them. It was proved that, several years ago, plaintiff introduced into the colony an article which he called "French Coffee." It was got up in tins of a peculiar size and uniform capacity, with coloured labels; and the plaintiff established by his industry, perseverance, and expenditure a profitable sale for the article. Nobody appears to have entered into competition with him until about twelve months ago, when defendants, who are also coffee sellers, finding their trade had diminished owing to the enterprise of the plaintiff, introduced an article similar to what plaintiff had been selling, and got up in tins of the same size, material, and shape as plaintiff's. The colours on the tins used by plaintiff were red, white, and blue — the colours of the French national flag. Defendant's tins, as I have said, were similar in size, shape, and material, and apparently in capacity, and the colours used by them were similar to the colours that had been in use by plaintiff for the article that had been continuously sold by him to the general public. There was also evidence that although the middlemen—the retail dealers—were not likely to be deceived by the defendants' label so as to take it for the plaintiff's, yet that one of them at least (Watson) thought purchasers were likely to be deceived. There was evidence also by a trader of considerable experience in coffee buying and selling (Brandenburg), who observed some of the defendants' coffee in his shop, and thought it was another quality of Sparks's coffee. Upon making enquiries of his clerk, he was informed that it was purchased from and got up by the defendants, Harper. The impression was apparently so strong in his mind that at first sight people would be apt to be deceived by the colours, shape, capacity, and quality of the defendants' tins, that he afterwards communicated to Sparks that he thought, when he himself first saw it in his own shop, that it was an inferior coffee prepared by him. I take it that, in this case, the real question for the jury was not, whether experts used to comparing one label with another, but whether the ordinary run of purchasers would be likely to be deceived. The evidence that I have quoted seems to me to warrant the conclusion that they would. Looking at the two labels now before me, I must say that, had I known the one from experience, I would not be deceived by the other; but what would be the result with incautious or illiterate persons, accustomed to purchase Sparks's article, when they went into a shop and had presented to them a tin of the same shape and size, got up with a label of red, white, and blue, and with the catch words "French Coffee" upon it? I think the jury, as experienced business men, and after hearing the evidence of the other experienced persons that I have quoted, should not be regarded as having come to an unreasonable conclusion that purchasers of the class mentioned would be likely to be deceived. With regard to the intention, I do not think it necessary to go into that question,

beyond stating that I would have come to the same conclusion as the jury, that the defendants' object was to deceive unwary purchasers. The coffee they are in the habit of selling elsewhere, although the same words are used on the label, is got up with different colours, whilst the colours used here are those used on plaintiff's label. The admissions made by the defendants' salesmen, and the noticeable omission of the defendants' names from their Queensland labels, also afford strong evidence of this intention. The verdict should not, I think, be interfered with.

LILLEY, C.J.: I agree with my learned brother. The rule will be discharged, with costs.

Solicitors for plaintiff: *Wilson & Newman-Wilson.*

Solicitors for defendants: *Hart & Flower.*

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